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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

YVONNE BROWN,

Petitioner,

vs.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or not the United States Court of Appeals for the Third Circuit properly departed from existing law, as established by:

(1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and the Third Circuit decisions in *EEOC v. Metal Service Co,* 892 F.2d 341 (3d Cir. 1990) and *Bennun v. Rutgers State University,* 941 F.2d 154 (3d Cir. 1991), *cert. denied,* __ U.S. __, 112 S. Ct. 956, 117 L. Ed. 2d 174 (1992); and

(2) the New Jersey Contractual Liability Act, N.J.S. 59:13-1, *et seq.* and the New Jersey Supreme Court case of *Fuchilla v. Layman,* 109 N.J. 319 (1988), *cert. denied,* 488 U.S. 826 (1988), when it affirmed the decision of the United States District Court that had granted summary judgment dismissing the complaint.

RULE 28.1 LIST OF PARTIES

All parties to this proceeding appear in the caption of the case.

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OPINION BELOW

On July 6, 1994, the United States Court of Appeals for the Third Circuit, issued a judgment order, without opinion, affirming the decision of the United States District Court, dated October 20, 1993, that dismissed, via summary judgment, petitioner's complaint in its entirety. *See* Appendix A and B, 1a-18a.

STATEMENT OF JURISDICTION

The petitioner Yvonne Brown, respectfully requests that this Court grant the petition for a writ of certiorari seeking review of the Third Circuit's affirmation of the District Court's decision granting summary judgment/dismissal of the complaint.

The affirmance by the Third Circuit (of the decision of the District Court) is dated July 6, 1994. *See* Appendix A, 1a-2a. This Court has jurisdiction to review the Third Circuit's affirmation by writ of certiorari as set forth in 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this matter are the following:

(A) Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2:

> (a) It shall be unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(B) New Jersey Contractual Liability Act, N.J.S. 59:13-2:

Definitions

As used in this chapter: "State" shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue or be sued.

(C) New Jersey Contractual Liability Act, N.J.S. 59:13-3:

Waiver of immunity from liability to contract

The State of New Jersey hereby waives its sovereign immunity from liability arising out of an express contract or a contract implied in fact and consents to have the same determined in accordance with the rules of law applicable to individuals and corporations; provided, however, that there shall be no recovery against the State for punitive or consequential damages arising out of contract nor shall there be any recovery against the State for claims based upon implied warranties or upon contracts implied in law.

(D) Medical and Dental Education Act of 1970, N.J.S. 18A:64G-6:

Powers and duties of board

[Full text is annexed at Appendix D, 22a-27a.]

(E) Medical and Dental Education Act of 1970, N.J.S. 18A:64G-7:

Additional powers and duties of board

The board of trustees, in addition to the other powers and duties provided herein, shall have and exercise the powers, rights and privileges that are incident to the proper government, conduct and management of the university and the control of its properties and funds and such powers granted to the university or the board or reasonably implied, may be exercised without recourse or reference to any department or agency of the State, except as otherwise provided by this act. In addition, the board may retain independent counsel with the approval of the Attorney General.

(F) The University of Medicine and Dentistry of New Jersey Flexibility Act of 1992, N.J.S. 18A:64G-3.10

Law governing contract claims and suits

Notwithstanding any of the provisions of the "New Jersey Contractual Liability Act (N.J.S.59:13-1. et seq.) to the contrary,

contract claims and suits against the university shall be governed by that act.

(G) The University of Medicine and Dentistry of New Jersey Flexibility Act of 1992, N.J.S. 18A:64G-6:

Powers and duties of board

[Full text is annexed at Appendix E, 28a-37a.]

STATEMENT OF THE CASE

On February 28, 1991, petitioner Yvonne Brown, filed a complaint in the United States District Court for the District of New Jersey. Jurisdiction of the Court was based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The complaint alleged employment discrimination on the basis of race and breach of the implied covenant of good faith and fair dealing with regard to her employment agreement with respondent, the University of Medicine and Dentistry of New Jersey ("UMDNJ").

Ms. Brown, an African-American female, was employed as a Dental Therapist/Dental Hygienist at UMDNJ from April 11, 1977 to June 1991. In that position, Ms. Brown treated patients at the school's dental clinic, recruited patients for the clinic, and designed and conducted research projects. At the same time, She also served as an instructor in the dental clinic and in UMDNJ's Department of Pediatrics and Community Health's nutrition program.

Faculty positions at UMDNJ were not awarded at regular intervals to employees who had previously provided meritorious service. Instead, request for a promotion/appointment to faculty status, was to be submitted to the department chairman who then proceeds with a recommendation to the department. Three years

after commencing employment at UMDNJ, Ms. Brown made a request for promotion from staff to faculty status (entry level-instructor), as a Dental Professional/Dental Therapist/Dental Hygienist. The request was submitted to Dr. Zia Shey in 1980, then acting chairman of the Department of Pediatrics. The request was rejected without explanation.

During June 1987, Ms. Brown approached Dr. Milton Houpt, the chairman of the department, with the same request, that is, promotion to faculty status. Dr. Houpt also denied consideration of her request, adding "What did [you] [Ms. Brown] do to deserve a faculty position?" This dialogue was confirmed in Dr. Houpt's deposition testimony, where he stated that Ms. Brown's "job was a staff position and did not merit a faculty appointment." Dr. Houpt further testified that Ms. Brown could not have aspired to a higher position in the Department of Pediatrics. *See* Appendix C, 19a-21a.

On or about June 25, 1991, Ms. Brown was informed that her position was eliminated and that she would be laid off, effective July 8, 1991. Conveniently for UMDNJ, she was on medical leave on that date. Nevertheless, she elected to exercise her "bumping rights," that is, to exercise her seniority for an open position, UMDNJ opposed those efforts resulting in the denial of continued employment.

After Ms. Brown was terminated, her former position and job duties in the Department of Pediatrics were filled by two non-African-American females. The first appointment was made to Cynthia Fong. Ms. Fong did not possess Ms. Brown's clinical experience, nevertheless, she received a faculty appointment. In fact, Ms. Fong's initial request for a faculty appointment was also denied, however, she was apparently given constructive advice by UMDNJ and, thereafter, given the notable opportunity to improve her resume. Upon proceeding with a second request, she was awarded the promotion.

The second individual, Diane Schoen, was hired by means of an advertisement. Although Ms. Brown remained available for employment, curiously, UMDNJ made no effort to contact her to determine if she would like to return to her former position. Instead, when questioned about the Schoen appointment, Dr. Houpt testified incredibly at depositions, that Ms. Brown could have made application for her former position in the Department of Pediatrics, which was eventually awarded to Ms. Schoen, at a faculty level. No consideration was given to Ms. Brown for her years of service, her exceptional knowledge of the position and duties and the fact that termination of her employment was ostensibly on grounds that her position was eliminated.

In all of its submissions, UMDNJ has offered no explanation as to why the position previously occupied by Ms. Brown, was resuscitated and reclassified as a faculty position, even after Ms. Brown was laid off or, more significantly, why no offer was made to her to assume her former position. In its brief to the Third Circuit, UMDNJ took a schizophrenic approach to this irreconcilable and blatant act of discrimination. On the one hand, UMDNJ claims that Ms. Brown, did not possess the requisite qualifications for promotion to a faculty position. Thereafter, UMDNJ assumes a different posture, maintaining that after Ms. Brown was laid off from her position as a dental hygienist with the Department of Pediatrics (when it was revised to a faculty position) she could have applied for her former position.

Furthermore, while UMDNJ emphasized below the talents of Cynthia Fong and Diane Schoen as "teachers, not clinicians," it is undisputed that both of these individuals replaced Ms. Brown in the Department of Pediatrics after she was laid off (ostensibly for budgetary reasons). No explanation is offered as to why these two women, performing the same clinical and lecture duties as Ms. Brown, became and remained faculty members. In fact, UMDNJ acknowledged that Ms. Fong had no involvement treating patients.

Obviously, when it came to Ms. Brown, the criteria for advancement was very different from that applied to other individuals.

UMDNJ deliberately set out to exclude Ms. Brown from a faculty position. No standards existed for promoting individuals to a faculty position. The decision to grant faculty status was purely a subjective one.

UMDNJ also completely ignored Ms. Brown's established work and academic record. That is, she taught more hours, was available in the dental clinic for longer hours, had greater student contact and held a master's degree in health education from Columbia University. At all times, Ms. Brown's work evaluations, abilities and potential were deemed satisfactory. There was never a question as to her work product, in fact, she has never been denied a merit increase while at UMDNJ.

UMDNJ further clouded the record below by intentionally and deliberately proceeding with an unsubstantiated attack on Ms. Brown's record. In fact, in its submissions to the Third Circuit, UMDNJ did sneeringly refer to Ms. Brown's requests for promotion as "demands" for faculty appointment. However, as was clearly demonstrated to the courts below, Cynthia Fong's first request for a faculty appointment was also rejected. In addition, the treatment by UMDNJ upon Ms. Brown to that upon Ms. Fong is in stark contrast. Ms. Fong was informed of the reasons for her rejection and was given an opportunity to resuscitate her application and credentials. Ms. Brown was not afforded the same opportunity.

Due to her very obvious and notorious efforts to speak up about her lack of advancement to those in authority and her presentation of her grievance to UMDNJ's affirmative action office, Ms. Brown was labeled a "troublemaker." She eventually

learned from students and co-workers that they were ordered not to provide medical treatment for her because UMDNJ was "going to get rid of" her.

Ms. Brown, a member of Teamsters Local 97 of New Jersey, the union with a collective bargaining agreement with UMDNJ, filed a grievance with the Local 97 when she was denied a promotion. The union did nothing on her behalf.

On June 4, 1993, UMDNJ filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6) and a motion for summary judgment, pursuant to Fed. R. Civ. P. 56(b). UMDNJ sought partial summary judgment for "failure to state a claim with respect to allegations regarding breach of contract, disallowing the testimony of Dr. Kenneth Clark, and dismissing as time-barred any claims arising out of events or circumstances occurring prior to September 7, 1987."

An opposition brief was filed by Ms. Brown. The brief set forth numerous genuine issues of fact, including but not limited to, the discrepancy in the standards alleged by UMDNJ in promoting individuals to faculty status and the fact that her position was filled by two non-African-American females. A reply was submitted by UMDNJ. Because of the factual issues raised by UMDNJ in its reply brief, Ms. Brown submitted a sur-reply and affidavit.

On August 3, 1993, oral argument was heard before the United States Magistrate.[1]

On October 18, 1993, an Order and Opinion were issued by the United States District Court, granting summary judgment to

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1. The parties had waived their right to proceed before a judge of the United States District Court and agreed to proceed before a United States Magistrate. An order pursuant to 28 U.S.C. § 636(c) was filed.

UMDNJ and, thereby, dismissing the complaint. Despite the clear disputes of material facts presented, the District Court found that Ms. Brown failed to "make out a prima facie case" of discrimination and that the New Jersey Contractual Liability Act, N.J.S. 59:13-1, *et seq.*, precluded her contract claim. *See* Appendix B, 3a-18a.

On July 6, 1994, the United States Court of Appeals for the Third Circuit, without opinion, affirmed the decision of the District Court without opinion. *See* Appendix A, 1a-2a.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT INCORRECTLY SANCTIONED A DEPARTURE FROM ESTABLISHED LAW PURSUANT TO 42 U.S.C. § 2000e-2.

A. The Third Circuit Erred in Its Affirmance of the Decision of the District Court Granting Summary Judgment in Dismissal of Petitioner's Claims of Employment Discrimination, Established Under 42 U.S.C. § 2000e-2.

The complaint alleged employment discrimination pursuant to 42 U.S.C. §2000e-2. The statute states in part:

> (a) It shall be unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

> of employment, because of such individual's race, color, religion, sex, or national origin;
> . . . .

As set forth by this Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), the plaintiff must establish a prima facie case. That is, she is a member of a protected class; that she was qualified for and rejected for the position; and that non-members of a protected class were treated more favorably.

After the plaintiff has established a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for its action. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252 (1981). If the defendant's evidence creates a genuine issue of fact, the presumption of discrimination drops from the case and the plaintiff, must prove that the defendant's reasons were a pretext for the discrimination. *Burdine* at 254-55, 257. This can be established in one of two ways: "either directly . . . persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered reason is unworthy of credence. *Burdine* at 256.

The opinion of the District Court barely considered the elements of Ms. Brown's prima facie case. Instead it fixated on the ostensible reason provided by UMDNJ for its failure to consider Ms. Brown for a faculty position. That reason being that Ms. Brown did not apply for the positions which were eventually awarded to Ms. Fong and Ms. Schoen.

The District Court ignored the rebuttal facts. That is, Ms. Fong did not apply for an open faculty position. She requested a promotion and was awarded the faculty position upon review and recommendation. Ms. Schoen applied for the position that Ms. Brown had held after *Ms. Brown was informed that her position*

was eliminated. Neither one of these facts were considered by the District Court. Nor did the Third Circuit consider them.

The failure of the Third Circuit to consider the rebuttal evidence is against the case law established in *EEOC v. Metal Service Co.*, 892 F.2d 341 (3d Cir. 1990). In that case, two black brothers sought employment at Metal Service Co., a company that entered into an agreement with Job Service, a State agency which referred the job applicants to the company as needed. *Id.* at 343. One brother, Steven Brown, filled out a job application with Job Service and indicated his desire for a job at Metal Service Co. The other brother Willie Brown, made several attempts to obtain employment at Metal Service Co. by applying directly. He was told that he must apply through Job Service. Meanwhile, Metal Service Co. hired six employees, all white, and all hired by direct application with the company. *Id.* at 344.

The case was tried. At the close of the EEOC's case, Metal Service Co. moved for a directed verdict on the basis that the EEOC had not presented any evidence that Job Service had submitted the Browns' applications to the company. *Id.* at 344. The trial court dismissed Steven Brown's case but allowed the company to submit evidence as to Willie Brown's application. *Id.* at 345. Metal Service Co. presented testimony that it was unable to find Willie Brown's application. Whereupon, the trial court directed a verdict in favor of defendant on Willie Brown's case. *Id.* at 345.

The Third Circuit reversed the trial court finding that the EEOC had established a *prima facie* case of employment discrimination. The Third Circuit stated the following:

> Thus, since "[the] importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof

there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," Teamsters, 431 U.S. at 358, courts need not, and should not, stubbornly analyze all Title VII factual scenarios through the McDonnell Douglas formula. [Citations omitted]. *Instead, courts must be sensitive to the myriad of ways such an inference can be created. Simply stated, a Title VII plaintiff has established a prima facie case when sufficient evidence is offered such that the court can infer that if the employer's actions remain unexplained it is more likely than not that such actions were based on impermissible reasons.* See Furnco, 438 U.S. at 576; Gay, 694 F.2d at 538; Jackson, 624 F.2d at 440. [Emphasis added].

With this principle as our touchstone, we believe the EEOC has established a prima facie case of discrimination under Title VII. *Courts have generally held that the failure to formally apply for a job opening will not bar a Title VII plaintiff from establishing a prima facie claim of discriminatory hiring, as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer. This is true both in failure to promote cases,* see Holsey v. Armour & Co., 743 F.2d 199, 208-09 (4th Cir. 1984), cert. denied, 470 U.S. 1028, 84 L. Ed. 2d 784, 105 S. Ct. 1395 (1985) (where employee was never asked to fill out an application, the

employer had no blacks in sales positions, and had actively discouraged black applicants, casual inquiry into the possibility of promotion to a sales job sufficient for application); Paxton v. Union Nat'l Bank, 688 F.2d 552, 1568 (8th Cir. 1982), cert. denied, 460 U.S. 1083, 76 L. Ed. 2d 345, 103 S. Ct. 1772 (1983) (where vacancy not posted and plaintiff did not hear about it from any other source until the position was filled, expression of a general desire to advance in bank was sufficient for application); Abrams v. Baylor College of Medicine, 581 F. Supp. 1570, 1579 (S.D. Tex. 1984), aff'd in part and rev'd in part on other grounds, 805 F.2d 528 (5th Cir. 1986) (where interest in participating in career advancing program was not communicated by formal application but spread through word-of-mouth, plaintiff's informal communication to his supervisors of his desire to participate is enough for the prima facie case); Ferguson v. E.I. duPont de Nemours and Co., Inc., 560 F. Supp. 1172, 1192-93 (D. Del. 1983) (where job vacancies not posted or advertised, plaintiff's "generalized expression of interest [to supervisor] can be considered an application" even though communicated interest was actually for another position); cf. Box v. A & P Tea Co., 772 F.2d 1372, 1376-77 (7th Cir. 1985), cert. denied, 478 U.S. 1010, 92 L. Ed. 2d 724, 106 S. Ct. 3311 (1986) (where employer had no system to ensure all interested applicants could apply, no formal applications were sought and job openings were not posted, "the plaintiff can establish the application

> element of the prima facie case by showing that, had she known of . . . [the] opening, she would have applied"), *and in failure to hire cases.* See Furnco, 438 U.S. at 576 (plaintiffs established their prima facie case when they showed, inter alia, that "they did everything within their power to apply for employment"); Lowe, 775 F.2d at 1002-03, 1005-06; Grant, 635 F.2d at 1017 (where plaintiffs generally made their interest in foremen jobs known, court did not require them to reapply every time a new construction job came up or at precisely the exact time when the superintendents were considering hiring for the job); cf. Harris v. Birmingham Bd. of Educ., 712 F.2d 1377, 1383 (11th Cir. 1983) (the fact that the school system failed to post coaching vacancies, lacked objective standards in hiring and used unstructured principal evaluations contributed to the establishment of plaintiff's prima facie case even though he did not formally apply for particular coaching job in question). [Emphasis added].

Id. at 348-349.

The basic premise, which the District Court failed to recognize and acknowledge in this matter, is that the selection process for elevating UMDNJ staff personnel to a faculty position is not an either/or proposition. The positions are created and the appointments are made on an *ad hoc* basis. No position was open when Ms. Fong expressed an interest in a promotion to faculty status. Yet she was considered and her appointment granted after her second request. Ms. Brown never maintained that she should have been appointed to the position ultimately awarded to Ms.

Fong. However, Ms. Brown does ask that this Court insure that she receive the same consideration and opportunity for advancement as was made available to others.

As stated above, by the United States Court of Appeals for the Third Circuit in EEOC v. Metal Service Co, *supra* — failure to formally apply for a job opening will not bar a Title VII plaintiff from establishing a prima facie claim of discriminatory hiring, as long as the plaintiff made every reasonable attempt to convey interest in the job to the employer. *Id.* at 348.

Ms. Brown did everything conceivable and reasonable to convey her interest in job advancement. However, her requests were not treated with the consideration and thought which was afforded to both Ms. Fong and Ms. Schoen. Through Dr. Houpt, UMDNJ minimized and ignored Ms. Brown's years of experience as a clinical instructor. Yet her replacements were two individuals who had none of these demonstrated skills. To truly add insult to injury, both of these individuals are given faculty appointments. Ms. Brown had clearly demonstrated her *prima facie* case of discrimination.

In summary, the facts which cannot be ignored are:

(1) Ms. Brown, a woman of African-American descent, twice in 14 years of service as dental clinic instructor at UMDNJ, sought a promotion to faculty member;

(2) After 14 years of service, Ms. Brown is informed that her position was being eliminated for budgetary reasons. She elects to exercise her "bumping rights" in the event a position becomes available;

(3) Ms. Fong, who is not African-American, and who received a faculty appointment upon her second request, is

assigned to take over Ms. Brown's duties in the dental clinic. Ms. Fong's dental clinic experience is not as extensive as Ms. Brown's. UMDNJ does not inform Ms. Brown that her position was revived;

(4) UMDNJ advertises for a another clinic instructor, who will have faculty status, to assume the remainder of the job duties formerly performed by Ms. Brown. UMDNJ does not inform Ms. Brown that her position has been re-opened as a faculty position. Nor do they inform her that she may want to apply for the re-opened position;

(5) The position is awarded to Ms. Schoen, a non-African-American, who also does not possess the clinical experience Ms. Brown has.

B. UMDNJ Failed to Demonstrate A Legitimate Non-Discriminatory Reason for Rejecting Ms. Brown's Request for an Appointment to Faculty Status.

UMDNJ had represented, disingenuously, to the courts below that the faculty appointments in question were made based upon non-discriminatory criteria. Meanwhile, UMDNJ has admitted that neither Ms. Fong nor Ms. Schoen have clinical experience. Yet, both of these women were given Ms. Brown's clinical duties. The pronouncements by UMDNJ to the courts below, that it wished to maintain "academic standards" and a desire to establish UMDNJ as one of the nation's top 25 academic health sciences center cannot be reconciled with the fact that UMDNJ expressly rejected a person of extensive and unquestioned clinical experience — instead appointing two persons with no clinical experience.

A challenge to the promotion criteria in a state-affiliated institution of higher learning was upheld in the case of *Bennun v. Rutgers State University,* 941 F.2d 154 (3d Cir. 1991), *cert. denied,* __ U.S. __, 112 S. Ct. 956, 117 L. Ed. 2d 174 (1992). In that matter,

the Third Circuit affirmed the decision of the district court in granting a promotion to plaintiff from tenured associate professor to full professor. *Id.* at 157. Defendant had argued that plaintiff could not be compared to another associate professor who was promoted because plaintiff was a researcher, whereas, the promoted professor was a teacher. In rejecting this argument, the Third Circuit stated:

> Of course, we recognize the difference between Somberg, [the promoted professor] primarily a teacher, and Bennun, primarily a researcher. Still, whatever particular areas of strength or weakness one or the other promotion candidate has, and evaluation based on objective criteria requires all those criteria to be objectively applied. If that is done then one candidate's strength will offset his weakness in comparison with another's strength and the converse will permit objective comparison. Here, Bennun's strengths were not given the same overall weight as were Somberg's. In one of Bennun's stronger areas, research accomplishments, he was held to a higher standard than Somberg. Rutgers' articulated nondiscriminatory reliance on the five criteria, taken as a whole, in deciding not to promote Bennun is so undermined by its inconsistency in applying them that we cannot hold the district court's finding was clearly erroneous. The district court did not commit clear error in finding Rutgers' assigned reason for denying Bennun the rank of full professor was a pretext . . . .

Id. at 179-180.

Here, UMDNJ is unable to establish a non-discriminatory reason for rejecting Ms. Brown's request for a faculty appointment. If anything, by pointing out Ms. Fong's and Ms. Schoen's teaching experience over their clinical experience, UMDNJ exposes it's inconsistency and failure to apply any reasonable standard to faculty promotions.

Even if UMDNJ's explanation for promoting Ms. Fong and Ms. Schoen is viewed as nondiscriminatory, the purported reason given can only be considered as an afterthought and certainly pretextual, when placed next to the facts before this Court. Neither Ms. Fong or Ms. Schoen are of African-American descent. Furthermore, only after Ms. Brown was laid off, for alleged budgetary reasons, was her position reclassified to a faculty position. Coincidence? Definitely not! There are no subtle, but instead very clear evidence in the record to support Ms. Brown's charge of discrimination and for reversal of the District Court's dismissal of her complaint.

II.

THE THIRD CIRCUIT ERRED IN ITS AFFIRMANCE OF THE DISTRICT COURT'S DEPARTURE FROM ESTABLISHED NEW JERSEY LAW VIS-A-VIS THE RIGHT TO SUE AN ENTITY OF THE STATE OF NEW JERSEY FOR VIOLATION OF CONTRACT RIGHTS.

Ms. Brown alleged that UMDNJ violated her contractual right of good faith and fair dealing when UMDNJ failed to provide to her equal consideration of her requests for promotion. UMDNJ has argued that UMDNJ is immune from suit, thereby barring her claim of breach of contract. Although the District Court agreed with UMDNJ, the decision was against the established law regarding contractual immunity for State institutions such as UMDNJ.

The New Jersey Contractual Liability Law, N.J.S. 59:13-1, *et seq.* was enacted in 1972. The essential statutory provisions are N.J.S. 59:13-2 and N.J.S. 59:13-3:

N.J.S. 59:13-2 states:

> Definitions
>
> As used in this chapter: "State" shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue or be sued.

N.J.S. 59:13-3 states:

> Waiver of immunity from liability to contract
>
> The State of New Jersey hereby waives its sovereign immunity from liability arising out of an express contract or a contract implied in fact and consents to have the same determined in accordance with the rules of law applicable to individuals and corporations; provided, however, that there shall be no recovery against the State for punitive or consequential damages arising out of contract nor shall there be any recovery against the State for claims based upon implied warranties or upon contracts implied in law.

At the time of the filing of this matter, UMDNJ was governed by the Medical and Dental Education Act of 1970, N.J.S. 18A:64G-1, *et seq.* The Medical and Dental Education Act of 1970 did not provide to UMDNJ the power to sue or be sued. The

question of whether or not UMDNJ may be sued was addressed in the New Jersey Supreme Court matter of *Fuchilla v. Layman*, 109 N.J. 319 (1988), *cert. denied*, 488 U.S. 826 (1988).

In *Fuchilla, supra,* plaintiff brought suit against UMDNJ pursuant to the Civil Rights Act, 42 U.S.C. § 1983 and the New Jersey Law Against Discrimination, N.J.S. 10:5-1, *et seq.* There, as here, the New Jersey Attorney General argued that UMDNJ was an alter ego of the State and therefore could be sued. *Id.* at 323-326.

The New Jersey Supreme Court specifically determined that UMDNJ *was not* the alter ego of the State and therefore could be sued for violations of the Civil Rights Act. *Id.* at 330. In support of that determination, the *Fuchilla* court analyzed nine different factors which included: (1) local law or decisions; (2) whether the State or UMDNJ would pay a judgment; (3) whether UMDNJ has the power or funds to pay the judgment; (4) whether UMDNJ performs a proprietary or government function; (5) whether UMDNJ is separately incorporated; (6) whether UMDNJ has autonomy over its operations; (7) *whether UMDNJ has the power to sue or be sued and to enter into contracts*; (8) whether UMDNJ is immune from state taxation; and (9) whether the State has immunized itself from responsibility for the entity's operation. *Id.* at 326. As stated above, after weighing all of these factors, the New Jersey Supreme Court allowed the 1983 suit to continue.

In dismissing Ms. Brown's contract claim, the District Court below relied upon a New Jersey trial court case, *Rich v. State,* 171 N.J. Super. 91 (Law Div. 1979), to support its finding that UMDNJ was a public entity and as such, was an alter ego of State. Thereby cloaking UMDNJ with immunity.

The District Court below also considered the statutory powers granted to UMDNJ under the Medical and Dental Education Act of 1970. Specifically, N.J.S. 18A:64G-6; Powers and duties of board [of trustees] and N.J.S. 18A:64G-7; Additional powers and duties

of board. The District Court concluded that because the Medical and Dental Education Act did not specifically provide UMDNJ with the power to sue or be sued, UMDNJ was immune from contractual claims.

Again, the District Court ignored the New Jersey Supreme Court's examination of this issue in *Fuchilla, supra.* As stated in *Fuchilla*:

> . . . UMDNJ has the power to contract. N.J.S.A. 18A:64G-6(1). Not so clear, however, is UMDNJ's power to sue and be sued. See N.J.S.A. 18A:64G-3.4. The Attorney General contends that UMDNJ does not have such power to sue or be sued. That contention becomes problematic, however, upon considering that the Legislature has declared that the board of trustees has "in addition to the other powers and duties provided [in the Medical and Dental Education Act], * * * the powers, rights and privileges that are incident to the proper government, conduct and management of the university * * *," and that "such powers granted to the university or the board or reasonably implied, may be exercised without recourse or reference to any department or agency of the State, except as otherwise provided by this act. In addition, the board may retain independent counsel with the approval of the Attorney General." N.J.S.A. 18A:64G-7. ***Arguably. it would make little sense to authorize the Board to retain independent counsel if it could not sue and be sued. and the broad powers granted to the board include that power.*** (Emphasis added).

Id. at 329.

In an obvious attempt to circumvent the reasoning and holding of *Fuchilla, supra,* and in order to support its dismissal of Ms. Brown's complaint in its entirety, the District Court included in its analysis, The University of Medicine and Dentistry of New Jersey Flexibility Act of 1992, N.J.S. 18A:64G3.8, *et seq.* In an awkward manner, the District Court inferred that because The University of Medicine and Dentistry of New Jersey Flexibility Act of 1992 specifically conferred upon UMDNJ the power to sue or be sued, then that meant that prior to 1992, UMDNJ did not have such powers. This reasoning by the District Court was totally without basis in either statutory history or in New Jersey case law.

Moreover, as shown in *Fuchilla,* UMDNJ always had such powers, albeit without the words "to sue or be sued." As the New Jersey Supreme Court in *Fuchilla* realized, the fiction that UMDNJ could not sue or be sued, was just that fiction.

The District Court ignored the pronouncements by the highest court in New Jersey in determining whether or not Ms. Brown should be allowed to pursue her contract claim against UMDNJ. To add insult to injury, the Third Circuit sanctioned the departure and reasoning performed by the District Court by failing to reverse the District Court. Ms. Brown respectfully submits to this Court that the failure of the Third Circuit to review and reverse such error should not be continue.

III.

BY FAILING TO REVERSE THE DISTRICT COURT, THE THIRD CIRCUIT SANCTIONED A DEPARTURE OF THE LAW GOVERNING THE STANDARDS RELATED TO SUMMARY JUDGMENT MOTIONS.

A. The Third Circuit and the District Court Failed to Follow *Anderson* and *Celotex*.

The Third Circuit and the District Court failed to acknowledge that the evidence would support a finding by a fact finder that race played a role in the treatment of and the denial of a faculty position to Ms. Brown. The summary judgment procedure as set forth in Fed. R. Civ. P. 56 (c) states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As stated by this Court in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986) ". . . [t]he requirement is that there be no genuine issue of material fact" to be decided before a court can grant summary judgment. *Id.* at 248.

This Court in *Anderson, supra,* made the following observations as to the role of the trial court when confronted with a motion for summary judgment.

> Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. . .
>
> * * *
>
> . . . [C]redibility determinations, the

> weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 254-255.

In *Celotex v. Catrett,* 477 U.S. 317 (1986), this Court added:

> . . . [R]ule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried by jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 327.

The courts below ignored numerous genuine issues of material facts which can only be presented in a hearing. These issues include but are not limited to the following:

(1) *Was Yvonne Brown denied a faculty position on the basis of race?*

There is no question that Ms. Brown, who is of African-American descent, was denied a promotion to faculty status because of her race. Any inference that race played a role would have to be presented to a fact finder. Race was a factor even though it was unspoken. Dr. Houpt's decision to deny Ms. Brown a promotion may, on its face, appear unbiased, however, it was

discriminatory in its impact. This is proven by the fact that two other individuals, with less job experience, who are not African-American were assigned to faculty positions and are currently performing the job responsibilities in the Department of Pediatrics and Community Health at UMDNJ, that were previously performed by Ms. Brown.

(2) *If the refusal to promote to faculty status was not on account of her race, was the denial based upon a legitimate non-discriminatory explanation?*

UMDNJ has failed to rebut the evidence of pretext or other evidence that would support a finding that race played a role in the denial of the faculty promotion. The deposition testimony of Dr. Milton Houpt establishes that UMDNJ does not have an articulated standard by which individuals are promoted to a faculty position. The decision on whether or not an individual merits a promotion is purely a subjective — a decision that is simply made by the department chairman. With utmost arrogance, Dr. Houpt could not provide a single reason why he would not promote Ms. Brown other than his subjective feeling that she did not "deserve" one.

(3) *Even if Dr. Houpt was unable to articulate why Ms. Brown was not promoted, did Ms. Fong and/or Ms. Schoen possess better or greater qualifications than Ms. Brown, thereby establishing a non-discriminatory basis on the part of UMDNJ?*

The facts nakedly reveal that neither Ms. Fong or Ms. Schoen possessed greater qualifications than Ms. Brown in clinical instruction. Ms. Fong was promoted through a request for same. Ms. Fong's first request was rejected on the basis that she did not possess a master's degree. However, when she obtained her degree and re-submitted her request, she was elevated to faculty status. Ms. Schoen was hired by an open application process for Ms. Brown's former position. A position that was ostensibly eliminated

for budgetary reasons. As demonstrated in the record below, the elimination of this position was pretextual, as the underlying motive of UMDNJ was to eliminate Ms. Brown from the job. Ms. Schoen, who did not possess the clinical experience that Ms. Brown had, was hired as a faculty member, although she performed the same duties Ms. Brown performed previously.

(4) *Did UMDNJ use Ms. Brown's medical leave of absence as an excuse to eliminate her position, lay her off, deny her "bumping rights" and then redistribute her former responsibilities to two hygienists who were, coincidentally, promoted to faculty positions?*

The uncontroverted facts show that while Ms. Brown was on a medical leave of absence, she was informed that her position was eliminated and that she would be laid off. As a union member, she elected to exercise her "bumping rights", however, UMDNJ refused to recognize those rights. Her duties in the Department of Pediatrics and Community Health were taken over by two hygienists, Ms. Fong and Ms. Schoen, both of whom are faculty members.

The remarks that Ms. Brown was hearing from her students and co-workers regarding the fact that UMDNJ was about "to get rid of her" came true. UMDNJ was simply waiting for the opportunity in order to do so. Again, UMDNJ has offered no legitimate reason for these actions.

B. The Summary Judgment Decision Ought Properly Be Reversed.

Certainly, sufficient evidence was brought forward demonstrating that the alleged bias of UMDNJ played a role in Ms. Brown' denial to faculty status. It is without dispute that the District Court considered genuine issues of material fact which should not have been resolved on a motion for summary judgment.

Not only did the court proceed to resolve issues of material fact, but also, failed to consider those issues in a light most favorable to the non-moving party.

The courts below failed to consider Ms. Brown's contention that Ms. Fong, a co-worker with allegedly lesser qualifications, was awarded a faculty position, not through an open application process, but by mere request of her department chairman for an upgrade in position. The District Court mistakenly believed that Ms. Brown could have applied for the faculty position which was awarded to Ms. Fong. This is simply not true. In fact, in Ms. Fong's affidavit, she acknowledges that her appointment did not come about as a result of job posting or competition.

The Third Circuit and the District Court also determined a critical factual issue. That is, the subjective rejection of Ms. Brown request by Dr. Houpt. This is especially egregious in light of Dr. Houpt's deposition testimony wherein he stated that in his opinion, he felt that Ms. Brown's job duties "was not one which merited a faculty appointment." However, when Ms. Brown's position was ostensibly eliminated by UMDNJ, Dr. Houpt acknowledged that Ms. Brown's duties were taken over by two hygienists, both of whom are faculty members. No explanation is given by UMDNJ as to why the position once held by Ms. Brown suddenly merited faculty member status.

Further, the District Court and by inference, the Third Circuit, adopted UMDNJ's factual assertion that Ms. Brown failed to apply for the posted opening which was eventually awarded to Ms. Schoen. There is no mention of the fact that Ms. Brown was prevented from exercising her bumping rights after being "laid off", which if honored, may have allowed Ms. Brown re-instatement into her former position. Ms. Brown had amply demonstrated to the Courts below that the job posting was merely pretextual and that the underlying reason for the elimination of Ms. Brown's job was to eliminate her.

In short, UMDNJ has not articulated any legitimate reason for providing faculty positions to two non African-American females while denying plaintiff the same upgrade. The reason is clear — UMDNJ wanted to use any and all means possible not only deny Ms. Brown her promotion, but also, to replace her in the Department of Pediatrics. Ms. Brown should be afforded her day in court and respectfully urges this Court grant her petition for a writ of certiorari and direct the Third Circuit to reverse the order granting summary judgment entered by the District Court.

CONCLUSION

In granting summary judgment to UMDNJ, the District Court completely ignored or misinterpreted established case law precedent. The Third Circuit sanctioned this departure by the District Court by failing to reverse the District Court's decision. Not only has this error caused hardship upon Ms. Brown, but also, the affirmation by the Third Circuit of the District Court's opinion allows UMDNJ to arbitrarily and capriciously deny other individuals who are similarly situated, the opportunity for a fair and unbiased evaluation of their abilities, should they also desire advancement within the institution. Therefore, Ms. Brown respectfully requests that this Court grant this petition for a writ of certiorari and for summary reversal of the affirmation of the Third Circuit dated July 6, 1994.

Respectfully submitted

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Dated: October 3, 1994

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 6, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5715

YVONNE BROWN,

Appellant

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY

On Appeal from the United States District Court For the District of New Jersey
(D.C. Civil Action No. 91-cv-00889)
Honorable Joel A. Pisano, United States Magistrate Judge

Submitted Under Third Circuit LAR 34.1(a)
June 23, 1994

BEFORE: STAPLETON and GREENBERG, *Circuit Judges,* and FARNAN,* *District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

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* Honorable Joseph J. Farnan, Jr., United States District Judge for the District of Delaware, sitting by designation.

Appendix A

ORDERED AND ADJUDGED that the judgment of the district court entered October 25, 1993, be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

s/ Walter Stapleton
Circuit Judge

ATTEST:
s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: JULY 6, 1994

APPENDIX B — OPINION AND ORDER OF THE DISTRICT COURT DATED OCTOBER 20, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FILED OCT. 20, 1993

Civ. No. 91-884

YVONNE BROWN,

plaintiff,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,

defendant.

JOEL A. PISANO, U.S. MAGISTRATE JUDGE:

OPINION

INTRODUCTION

This matter comes before the Court upon defendant University of Medicine and Dentistry of New Jersey (UMDNJ)'s motion for summary judgment. Opposition was filed in response to this motion, and oral argument was heard on August 3, 1993. Pursuant to 28 *U.S.C.* § 636(c), the parties have consented to the jurisdiction of this Court for all purposes.

Appendix B

BACKGROUND

Plaintiff is a black female. She was employed by defendant from April 11, 1977 until June of 1991, as a dental hygienist/therapist. Plaintiff is bringing a claim of race discrimination against the University, stemming from a faculty position she requested in 1987, which request was denied.

Plaintiff alleges that she "was the only Dental Professional/Therapist/Dental Hygienist at UMDNJ whose position was not a faculty position." (Plaintiff's Brief in Opp. at 2). She also states that "coincidentally, a white female with lesser credentials . . . received the faculty appointment", even though plaintiff's "work evaluations, abilities and potential were deemed satisfactory and, in fact, at numerous other times, were the subject of praise." *Id.*

Defendant, meanwhile, paints a different picture of plaintiff's position within the University:

> Plaintiff's responsibilities as a licensed registered dental hygienist consisted primarily of rendering dental hygiene care and services to patients at the dental school. . . . Her interaction with dental students in this context involved relatively brief and informal guidance to students in matters of dental hygiene and nutrition. . . . She directed no courses, administered no examinations, graded no tests and issued no grades. . . . she has neither published nor presented scholarly papers. . . . In contrast to faculty members at the dental school who devote the bulk of their time to teaching and/or research and

> administrative activities, plaintiff spent the vast majority of her time arranging for patient care or treating patients.

(Defendant's Brief in Support at 2).

On or about June 25, 1991, plaintiff's position was eliminated by the University, and she was notified that she was to be laid off, effective July 8, 1991. (Plaintiff's Brief in Opp. at 2). Plaintiff had "bumping rights", however, pursuant to University policy, which she elected to use at that time. *Id.* at 2-3. Plaintiff was then assigned to numerous departments, including Pediatric Dentistry, but was ultimately laid off in 1992 when a University-wide reduction in force occurred. (Defendant's Brief in Support at 4).

Plaintiff then commenced to undertake several legal actions, including filing a grievance with Union Local 97, and filing a charge under Title VII with the Equal Employment Opportunity Commission (EEOC). A complaint was also filed with the State's Division on Civil Rights, pursuant to *N.J.S.A.* 10:5-1 *et seq.*, New Jersey's Law Against Discrimination (NJLAD).

On June 23, 1989, after investigating plaintiff's charges, the EEOC rendered a decision of "no probable cause". (Defendant's Brief in Support at 6). On December 24, 1990, plaintiff was issued a 90 day right to sue letter. (Plaintiff's Brief in Opp. at 3). The within action was filed on February 28,1991.

Plaintiff has been employed since January of 1993 as a health educator.

Appendix B

ANALYSIS

Standard of Review

Pursuant to *Fed. R.Civ. P.* 56(c), summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* In making this determination, a court must draw all inferences in favor of the nonmovant. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 fn.2 (3d Cir. 1983), *cert. denied*, 465 U.S. 1091 (1984). If no reasonable trier of fact could find for the nonmoving party, however, summary judgment must be granted. *Radich v. Goode*, 886 F.2d 1391, 1395 (3d Cir. 1989).

When the nonmoving party is a plaintiff, as in the instant case, and will bear the burden of proof at trial, the moving party may discharge its burden in a summary judgment motion "by 'showing' — that is, pointing out to the District Court — that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has fulfilled its burden of establishing the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Eiman v. Haworth, Inc.*, No. 91-1669, slip op. at 9 (D.N.J. March 12, 1993), quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A party opposing summary judgment "must set forth specific facts showing a genuine issue for trial and 'may not rest upon mere allegations, general denials, or . . . vague statements.' " *Einman*, slip op. at 9, quoting *Quiroga v. Hasbro, Inc.*, 934 F.2d 497 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 376 (1991). Summary

judgment may be granted if the nonmoving party's evidence is merely "colorable" or "not significantly probative". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In the instant case, no genuine issue of material fact exists for trial, therefore defendant's motion for summary judgment will be granted, with prejudice, in its entirety.

New Jersey Contractual Liability Act

The New Jersey Contractual Liability Act, *N.J.S.A.* 59:13-1 *et seq.*, governs actions against agencies or bodies politic of the State. The Act provides that:

> The State of New Jersey hereby waives its sovereign immunity from liability arising out of an express contract or a contract implied in fact and consents to have the same determined in accordance with the rules of law applicable to individuals and corporations, provided, however, that *there shall be no recovery against the State for punitive or consequential damages arising out of contract nor shall there be any recovery against the State for claims based upon implied warranties or upon contracts implied in law.* (emphasis added)

N.J.S.A. 59:13-3. The Act thus bars claims based upon contracts implied in law against the State, except that the Act does not apply to entities which are "statutorily authorized to sue or be sued." *N.J.S.A.* 59:13-2.

Counts XII and XIII of the complaint contain allegations of

breach of an implied covenant at law pertaining to Plaintiff's employment agreement with defendant:

XII

> The Plaintiff's employment agreement with the Defendant has implied in law a covenant of good faith and fair dealing by which Defendant UMDNJ promised to give full cooperation to the Plaintiff in her performance under said employment agreement and to refrain from any act which would prevent or impede the Plaintiff from performing all of the conditions of the agreement to be performed by her.

XIII

> Beginning in approximately April, 1977, and continuing Defendant UMDNJ has breached its implied covenant of good faith and fair dealing with regard to Plaintiff by preventing her from participating in certain professional meetings, thereby limiting her ability to more fully perform her responsibilities.

(Complaint at 7).

Because breach of an implied contract at law has been alleged, there are two basic issues which must be analyzed pursuant to *N.J.S.A.* 59:13-1:

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1. Is UMDNJ an agency of the State?

2. Does UMDNJ have the power to sue and be sued?

N.J.S.A. 18A:64G-3 expressly provides that "[t]here is hereby established in the Department of Higher Education a body corporate and politic to be known as the 'University of Medicine and Dentistry of New Jersey." *Id. in Rich v. State*, 171 N.J. Super. 91 (Law Div. 1979), the Supreme Court interpreted UMDNJ's enabling statute, The Medicine and Dentistry Education Act of 1970, *N.J.S.A.* 18A:64G-1 *et seq.*, and acknowledged that:

> Since the act designated the college as a state agency in the Department of Higher Education (*N.J.S.A.* 18A:64G-3), but without the power to sue and be sued (*N.J.S.A.* 18A:64G-6), the "public entity" which was sued was the State itself (*N.J.S.A.* 59:1-3).

Id. at 93. UMDNJ is thus an agency of the State for the purposes of this motion.

The Medicine and Dentistry Act of 1970 was amended in part with the enactment of The University of Medicine and Dentistry of New Jersey Flexibility Act. Pursuant to *N.J.S.A.* 18A:64G-6(t), this Act conferred upon the University "the power to sue and be sued." The Act also expressly retained UMDNJ's protection under The Contractual Liability Act, even though that Act does not apply to agencies which can sue or be sued:

> Notwithstanding any of the provisions of the "New Jersey Contractual Liability Act," N.J.S.

> 59:13-1 et seq., to the contrary, contract claims and suits against the university shall be governed by that act.

N.J.S.A. 18A:64G-3.10.

Plaintiff's argument on the issue of whether UMDNJ had the power to sue or be sued at the time the instant dispute arose is convoluted. Defendant's argument, on the other hand, is quite illustrative of this point:

> In *Cohen* [v. UMDNJ, 240 N.J. Super. 188 (Ch. Div 1989), *rev'd on other grounds*, __ N.J. __ (1993)] Judge Bachman was addressing the issue of whether UMDNJ was a state administrative agency within the meaning of *R.* 2:2-3 in order to determine whether the case before him belonged in the Appellate Division. In this context, the court, in *dicta,* cited to *N.J.S.A.* 18A:64G-6, 7 for the proposition that the University had the power to sue and be sued. *Cohen, supra* at 194. A close reading of those provisions, however, does not support his holding. Neither *N.J.S.A.* 18A:64G-6 nor 64G-7 explicitly grant the University the power to sue or be sued.

(Defendant's Brief in Support at 21). Defendant then continues:

> This is especially important to note, as both prior and current versions of this statute explicitly grant such authority. Prior to 1970, the statute which created the New Jersey

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> College of Medicine and Dentistry (now UMDNJ) specifically provided that the College, through its Board of Trustees had the "power and duty to . . . sue and be sued." *N.J.S.A.* 18A:64C-8. . . . When the statute was amended in 1970, this provision was deleted.

Id. at 21-22.[1]

This Court adopts defendant's reasoning in full. A review of *N.J.S.A.* 18A:64G-6[2] and *N.J.S.A.* 18A:64G-7[3] indicate that in

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1. Defendant further provided a summary of the legislative history of The Flexibility Act:

> The Flexibility Act was enacted, in part, in response to recommendations made by the Governor's Task Force on the Laws governing the University of Medicine and Dentistry of New Jersey. . . . In determining what proposals to make to the Governor, the task force studied and considered various restraints on the Universities ability to fully enter into and competitively participate in partnerships with the private sector which would enhance its competitive status. Among these restraints, the task force noted that "UMDNJ's enabling legislation does not provide that it can 'sue and be sued.' " *Report of the Governor's Task Force on the Laws Governing the University of Medicine and Dentistry of New Jersey*, March 30, 1989, at page 19.

(Defendant's Brief in support at 23).

2. This section is entitled "Powers and duties".

3. This section is entitled "Additional powers".

neither of those sections was UMDNJ given the right to sue or be sued. UMDNJ, therefore, did not have this right at the time that plaintiff's cause of action arose.[4] The issue of the retroactivity of the Flexibility Act need not be reached, therefore, in order for defendant to prove that UMDNJ did not have the power to sue or be sued at the time the alleged discrimination occurred.

Defendant is granted summary judgment on plaintiff's claims of breach of an implied covenant of good faith and fair dealing. Because these claims are precluded by the provisions of the Contractual Liability Act as applied to this case, the issue of whether plaintiff's claim for breach of the convenant of good faith and fair dealing is barred by the exclusivity provision of her collective bargaining agreement need not be reached.

Title VII

In addition to alleging breach of an implied covenant at law, plaintiff claims she was discriminated against on account of her race. The complaint states that:

VI

> Defendant UMDNJ has continued to willfully, knowingly and intentionally discriminate unlawfully against Plaintiff on account of her race.

VIII

> The acts, policies and practices of

4. Plaintiff's complaint "was filed on February 28, 1991, approximately two years prior to the effective date of the Flexibility Act." (Plaintiff's Brief in Opp. at 6).

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> Defendant UMDNJ alleged herein violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e et seq.

(Complaint at 4, 5). Also related to these claims of discrimination are plaintiff's allegations of intentional and negligent infliction of emotional distress, in Counts XVI and XVIII of the complaint.

In a case of alleged discrimination, plaintiff has the initial burden of establishing a prima facie case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Berndt v. Kaiser Aluminun & Chem. Sales, Inc.,* 789 F.2d 253 (3d Cir. 1986). Once plaintiff has made out a prima facie case, the burden of production shifts to the defendant to demonstrate that a legitimate nondiscriminatory reason exists for his conduct. *Id.* If defendant meets its burden, the burden then shifts back to the plaintiff to prove that defendant's reasons were merely pretext. *Id.* The ultimate burden of proof remains with plaintiff at all times, however. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

In order for plaintiff to make out a prima facie case, she must prove that:

1. she was within a protected class;

2. she was qualified for the position for which she applied;

3. she was not given that position, but that other equally or less qualified persons not in the protected class were given more favorable treatment.

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McDonnell Douglas, 411 U.S. at 802.

The instant analysis must also be made in the context of a motion for summary judgment. It need be determined, therefore, whether a genuine issue of material fact exists for trial. "A plaintiff's general and conclusory allegations alone, are insufficient to establish" that such an issue exists. *Miller v. Yellow Freight Systems, Inc.,* 748 F. Supp. 1074, 1078 (W.D. Pa. 1991), *aff'd,* 941 F.2d 1202 (3d Cir. 1991). Also, the "mere existence of some alleged dispute between the parties is an insufficient basis on which to deny a motion for summary judgment." *Baxter v. AT&T Communications,* 712 F. Supp. 1166, 1170 (D.N.J. 1990). Instead, plaintiff must "not only introduce evidence from which a reasonable person could infer that he is qualified; he must also introduce evidence that casts doubt on his employer's contention that there was a legitimate business reason for letting him go." *Healy v. N.Y. Life Ins. Co.,* 860 F.2d 1209, 1220 (3d Cir. 1988), *cert. denied,* 490 U.S. 1098 (1989).

Plaintiff has failed to make out a prima facie case. The gravamen of plaintiff's claim is discrimination occurred because she was denied a faculty position in the Department of Pediatric Dentistry that was later given to two less qualified white hygienists. However, the evidence shows that plaintiff never applied for the faculty positions given to the other two hygienists, one of which was also a member of a protected class.

Plaintiff applied for a faculty position within her department in 1987. (Brown Affid. at 1; Tr. at 13)[5]. However, the position that plaintiff requested did not exist at the time she requested it. (Tr. at 14). Meanwhile, plaintiff concedes that Cynthia Fong, one of the

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5. "Tr." denotes the transcript of oral argument heard on August 3, 1993.

employees who was given a faculty position and with whom plaintiff compares herself, received a faculty position different from the one that plaintiff requested. (Tr. at 15). Diane Schoen, a hygienist, was appointed to the faculty in January of 1992. However, plaintiff never applied for the positions awarded to Ms. Fong or Ms. Schoen. Ms. Fong received her faculty position through the Chairman of Oral Diagnosis and Radiology, and Ms. Schoen was selected "as the result of a publicized recruitment effort by the Department of Pediatric Dentistry in late 1991 that included a job posting in the dental school and also an advertisement in the New Jersey Dental Association Journal." (Defendant's Brief in Support at 11). Plaintiff never applied to the Chairman of the Department of Oral Diagnosis and Radiology, nor did she answer any of the postings for the job obtained by Ms. Schoen.

Plaintiff has not made out a prima facie case as she has not demonstrated that "other equally or less qualified persons not in the protected class were given more favorable treatment" in obtaining the position for which she applied. The persons with whom plaintiff claims were given more favorable treatment received faculty positions different from the one that plaintiff requested; stated differently, plaintiff never applied for the positions that Ms. Fong and Ms. Schoen received. Also, one of these persons, Ms. Fong, is also a member of a protected class. Plaintiff has therefore not satisfied the third prong of the *McDonnell Douglas* analysis, and her claim of racial discrimination cannot survive a motion for summary judgment.

CONCLUSION

For the aforementioned reasons, defendant's motion for summary judgment is granted with prejudice, and plaintiff's complaint is dismissed in its entirety.

Appendix B

s/ Joel A. Pisano
JOEL A. PISANO
U.S. MAGISTRATE JUDGE

Orig: Clerk
cc: Hon. Alfred M. Wolin
All parties
File

Appendix B

[stamped]
FILED
Sept. 20, 1993
at 8.30 . . . .
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Civ. No. 91-884

YVONNE BROWN,

plaintiff

-v-

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,

defendant

ORDER

THIS MATTER having come before the court upon defendant University of Medicine and Dentistry of New Jersey's motion for summary judgment, and opposition having been filed by the plaintiff, and oral argument having been heard on August 3, 1993, and for good cause having been shown;

IT IS on this 18th day of October, 1993

ORDERED that defendant's motion for summary judgment is granted with prejudice; and it is further

ORDERED that plaintiff's complaint is dismissed in its entirety.

Appendix B

s/ Joel A. Pisano
JOEL A. PISANO
U.S. MAGISTRATE JUDGE

Orig: Clerk
cc: Hon. Alfred M. Wolin
All parties
File

APPENDIX C — DEPOSITION EXCERPTS FROM THE DEPOSITION OF MILTON HOUPT, M.D. TAKEN ON JUNE 10, 1992

[17] A. Initially not. Initially, and this goes much before '87, but there was a time when she spoke to me, that's correct.

Q. Okay. Do you have a recollection better than my recollection about the 1987? I'm not trying to confuse you. Do you know when you had the discussion with Ms. Brown?

A. When I had the discussion?

Q. Yes.

A. No, I'm sorry, I don't recollect the specific date.

Q. Okay. Now, when Ms. Brown asked you about the faculty position, was anyone else present?

A. I don't think so.

Q. Was this orally? I mean or did she send you a memo?

A. I don't recall.

Q. All right. Do you recall speaking with her about it?

A. Yes.

Q. Can you tell me what your recollection of that conversation is?

A. I think the essence of the conversation was that she thought that her job merited promotion to a faculty position. And

my response was that her job was a staff [18] position and did not merit a faculty appointment.

Q. Do you remember if there was any discussion beyond that or was it as brief as your answer?

A. We could have spent some time talking about it, I'm sure, but I don't recall how long our conversation was.

Q. But my question is not so much the length of the conversation, but whether there was any elaboration of your response that you've just stated you indicated to her that you did not believe that her position merited the appointment to a faculty position?

A. The essence of my feeling as I recall it was that the job was not one which merited a faculty appointment.

Q. Did you explain to Ms. Brown what would merit a faculty appointment?

A. I could not then and I can't — I cannot now see that job meriting a faculty appointment. And I think that I explained that to her at that time.

Q. What specifically was her job at that time?

A. Her job at that time is similar to her job in pediatric dentistry now in that she functions primarily to service patients. A faculty position is one in

* * *

Appendix C

[40] Q. You kept referring — well, you occasionally just mentioned someone with that training when you were discussing these other positions to which Ms. Brown could aspire. What training are you referring to?

A. Somebody who has training in dental hygiene.

Q. With Ms. Brown's training in dental hygiene, do I understand you to say, then, that she could look to be considered for a health related professions position?

A. I can't speak to that. I can speak to positions in pediatric dentistry.

Q. Are there any positions in pediatric dentistry to which Ms. Brown could aspire?

A. Beyond what she is currently doing?

Q. Correct.

A. Not at the moment. Not that I foresee.

Q. Have there been positions say within the past five years that maybe no longer exist, to which her training would have made it reasonable for her to aspire? Pediatric dentistry I'm talking about.

A. Well, when we hired Diane Schoen, then it is possible that Ms. Brown could have applied for that position.

Q. Was that position posted?

* * *

APPENDIX D — MEDICAL AND DENTAL EDUCATION ACT OF 1970, N.J.S. 18A:64G-6

Medical and Dental Education Act of 1970

18A:64G-6. POWERS AND DUTIES OF BOARD

The board of trustees of the university, within the general policies and guidelines set by the Board of Higher Education, shall have the general supervision over and be vested with the conduct of the university, including its health care facilities regardless of the source of funding. It shall have the power and duty to:

(a) Adopt and use a corporate seal;

(b) Determine the educational curriculum and program of the university;

(c) Determine policies for the organization, administration, and development of the university;

(d) Study the educational and financial needs of the university, annually acquaint the Governor and Legislature with the condition of the university, and prepare and submit an annual request for appropriation to the State Board of Higher Education in accordance with law;

(e) Disburse all moneys appropriated to the university by the Legislature and all moneys received from tuition, fees, auxiliary services and other sources;

(f) Direct and control expenditures and transfers of funds appropriated to the university in accordance with the provisions of the State budget and appropriation acts of the Legislature, and, as to funds received from other sources, direct and control

expenditures and transfers in accordance with the terms of any applicable trusts, gifts, bequests, or other special provisions, reporting changes and additions thereto and transfers thereof to the Director of the Division of Budget and Accounting in the Department of the Treasury and to the Chancellor of Higher Education. All accounts of the university shall be subject to audit by the State at any time;

(g) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint and fix the compensation and term of office of a president of the university who shall be the executive officer of the university;

(h) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint, upon nomination of the president, such deans and other members of the academic, administrative and teaching staffs as shall be required and fix their compensation and terms of employment;

(i) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint, remove, promote and transfer such other officers, agents, or employees as may be required to carry out the provisions of this act and assign their duties, determine their salaries, and prescribe qualifications for all positions and in accordance with the salary schedules of the Civil Service Commission wherever possible;

(j) Fix and determine, after consultation with the Board of Higher Education, tuition rates, and other fees to be paid by students;

(k) Grant diplomas, certificates or degrees;

Appendix D

(l) Enter into contracts and agreements with the State or any of its political subdivisions or with the United States, or with any public body, department or other agency of the State of the United States or with any individual, form or corporation which are deemed necessary or advisable by the board for carrying out the provisions of this act. A contract or agreement pursuant to this subsection may require a municipality to undertake obligations and duties to be performed subsequent to the expiration of the term of office of the elected governing body of such municipality which initially entered into or approved said contract or agreement, and the obligations and duties so incurred by such municipality shall be binding and of full force and effect, notwithstanding that the term of office of the elected governing body of such municipality which initially entered into or approved said contract or agreement, shall have expired;

(m) Accept from any government or governmental department, agency or other public or private body or from any other source grants or contributions of money or property which the board may use for or in aid of any of its purposes;

(n)(1) Acquire (by gift, purchase, condemnation or otherwise), own, lease, dispose of, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for university purposes;

(2) Adopt standing operating rules and procedures for the purchase of all equipment, materials, supplies and services; however, on contract on behalf of the university shall be entered into for the purchase of services, materials, equipment and supplies, for doing of any work, or for the hiring of equipment or vehicles, where the sum to be expended exceeds $12,500.00 or the amount determined by the Governor as provided herein, unless the

university shall first publicly advertise for bids and shall award the contract to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the university, price and other factors considered. Such advertising shall not be required in those exceptions created by the Board of Trustees of the university, which shall be in substance those exceptions contained in sections 4 and 5 of P.L.1954, c. 48 (C. 52:34-9 and 10) or for the supplying of any product or the rendering of any service by a public utility subject to the jurisdiction of the Board of Public Utilities of this State and tariffs and schedules of the charges, made, charged, or exacted by the public utility for any such products to be supplied or services to be rendered are filed with the said board. Commencing January 1, 1985 and every two years thereafter, the Governor, in consultation with the Department of the Treasury, shall adjust the threshold amount set forth in this paragraph in direct proportion to the rise or fall of the consumer price index for all urban consumers in the New York City and Philadelphia areas as reported by the United States Department of Labor. The Governor shall notify the university of the adjustment. The adjustment shall become effective on July 1 of the year in which it is reported.

This subsection shall not prevent the university from having any work done by its own employees, nor shall it apply to repairs, or to the furnishing of materials, supplies or labor, or the hiring of equipment or vehicles, when the safety or protection of its or other public property or the public convenience requires or the exigency of the university's service will not admit of such advertisement. In such case, the university shall, by resolution passed by the affirmative vote of its board of trustees, declare the exigency or emergency to exist, and set forth in the resolution the nature and approximate amount to be expended; shall maintain appropriate records as to the reason for such awards; and shall report regularly

to its board of trustees on all such purchases, the amounts and the reasons therefor;

(3) Employ architects to plan buildings; secure bids for the construction of buildings and for the equipment thereof; make contracts for the construction of buildings and for equipment; and supervise the construction of buildings. All capital expenditures in excess of $500,000.00 shall be subject to the approval of the Board of Higher Education; and

(4) Manage and maintain, and provide for the payment of all charges on and expenses in respect of, all properties utilized by the university;

(o) Borrow money for the needs of the university, as deemed requisite by the board, in such amounts and for such time and upon such terms as may be determined by the board, provided that no such borrowing shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit or be payable out of property or funds, other than moneys appropriated for that purpose, of the State;

(p) Exercise the right of eminent domain, pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C. 20:3-1 et seq.), to acquire any property or interest therein;

(q) Adopt bylaws and make and promulgate such rules, regulations and orders, not inconsistent with the provisions of this act as are necessary and proper for the administration and operation of the university and to implement the provisions of this act;

(r) Authorize any new program, educational department or

school which will require, at the time of establishment or thereafter, an additional expenditure of money, if the establishment thereof is approved by the Board of Higher Education and provision is made therefor by law; and

(s) Function as a public employer under the "New Jersey Employer-Employee Relations Act," P.L.1941, c. 100 (C. 34:13A-1 et seq.) and conduct all labor negotiations, and with the participation of the Chancellor's Office and the Governor's Office of Employee Relations act as the chief spokesperson with respect to all matters under negotiation.

L.1970, c. 102, sec. 6. Amended by L.1981, c. 325, sec. 7, eff. Dec. 10, 1981; L.1985, c. 514, sec. 1, eff. Jan. 21, 1986.

APPENDIX E — THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY FLEXIBILITY ACT OF 1992, N.J.S. 18A:64G-6

The University of Medicine and Dentistry of New Jersey Flexibility Act of 1992.

18A:64G-6. POWERS AND DUTIES OF BOARD

The board of trustees of the university, within the general policies and guidelines set by the Board of Higher Education, shall have the general supervision over and be vested with the conduct of the university, including its health care facilities regardless of the source of funding. It shall have the power and duty to:

(a) Adopt and use a corporate seal;

(b) Determine the educational curriculum and program of the university;

(c) Determine policies for the organization, administration, and development of the university;

(d) Study the educational and financial needs of the university, annually acquaint the Governor and Legislature with the condition of the university, and prepare and submit an annual request for appropriation to the State Board of Higher Education in accordance with law;

(e) Disburse all moneys appropriated to the university by the Legislature and all moneys received from tuition, fees, auxiliary services and other sources;

(f) Direct and control expenditures and transfers of funds appropriated to the university in accordance with the provisions of

the State budget and appropriation acts of the Legislature, and, as to funds received from other sources, direct and control expenditures and transfers in accordance with the terms of any applicable trusts, gifts, bequests, or other special provisions, reporting changes and additions thereto and transfers thereof to the Director of the Division of Budget and Accounting in the Department of Treasury and to the Chancellor of Higher Education. All accounts of the university shall be subject to audit by the State at any time;

(g) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint and fix the compensation and term of office of a president of the university who shall be the executive officer of the university;

(h) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint, upon nomination of the president, such deans and other members of the academic, administrative and teaching staffs as shall be required and fix their compensation and terms of employment;

(i) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint, remove, promote and transfer such other officers, agents, or employees as may be required to carry out the provisions of this act and assign their duties, determine their salaries, and prescribe qualifications for all positions and in accordance with the salary schedules of the Civil Service Commission wherever possible;

(j) Fix and determine, after consultation with the Board of Higher Education, tuition rates, and other fees to be paid by students;

Appendix E

(k) Grant diplomas, certificates or degrees;

(l) Enter into contracts and agreements with the State or any of its political subdivisions or with the United States, or with any public body, department or other agency of the State or the United States or with any individual, form or corporation which are deemed necessary or advisable by the board for carrying out the provisions of this act. A contract or agreement pursuant to this subsection may require a municipality to undertake obligations and duties to be performed subsequent to the expiration of the term of office of the elected governing body of such municipality which initially entered into or approved said contract or agreement, and the obligations and duties so incurred by such municipality shall be binding and of full force and effect, notwithstanding that the term of office of the elected governing body of such municipality which initially entered into or approved said contract or agreement, shall have expired;

(m) Accept from any government or governmental department, agency or other public or private body or from any other source grants or contributions of money or property which the board may use for or in aid of any of its purposes;

(n)(1) Acquire (by gift, purchase, condemnation or otherwise), own, lease, dispose of, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for university purposes;

(2) Adopt standing operating rules and procedures for the purchase of all equipment, materials, supplies and services; however, no contract on behalf of the university shall be entered into for the purchase of services, materials, equipment and supplies, for doing of any work, or for the hiring of equipment or

vehicles, where the sum to be expended exceeds $12,500.00 or the amount determined by the Governor as provided herein, unless the university shall first publicly advertise for bids and shall award the contract to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the university, price and other factors considered. Such advertising shall not be required in those exceptions created by the board of trustees of the university, which shall be in substance those exceptions contained in sections 4 and 5 of P.L.1954, c.48 (c.52:34-9 and 10) or for the supplying of any product or the rendering of any service by a public utility subject to the jurisdiction of the Board of Public Utilities of this State and tariffs and schedules of the charges, made, charged, or exacted by the public utility for any such products to be supplied or services to be rendered are filed with the said board. Commencing January 1, 1985 and every two years thereafter, the Governor, in consultation with the Department of the Treasury, shall adjust the threshold amount set forth in this paragraph in direct proportion to the rise or fall of the consumer price index for all urban consumers in the New York City and the Philadelphia areas as reported by the United States Department of Labor. The Governor shall notify the university of the adjustment. The adjustment shall become effective on July 1 of the year in which it is reported.

This subsection shall not prevent the university from having any work done by its own employees, nor shall it apply to repairs, or to the furnishing of materials, supplies or labor, or the hiring of equipment or vehicles, when the safety or protection of its or other public property or the public convenience requires the exigency of the university's service will not admit of such advertisement. In such case, the university shall, by resolution passed by the affirmative vote of its board of trustees, declare the exigency or emergency to exist, and set forth in the resolution the nature and

approximate amount to be expended; shall maintain appropriate records as to the reason for such awards; and shall report regularly to its board of trustees on all such purchases, the amounts and the reasons therefor;

(3) Employ architects to plan buildings; secure bids for the construction of buildings and for equipment thereof; make contracts for the construction of buildings and for equipment; and supervise the construction of buildings. All capital expenditures in excess of $2,000,000 shall be subject to the approval of the Board of Higher Education except that commencing January 1, 1993 and every two years thereafter, the Governor, in consultation with the Department of the Treasury, shall adjust the threshold amount set forth in this paragraph in direct proportion to the rise or fall of the consumer price index for all urban consumers in the New York City and the Philadelphia areas as reported by the United States Department of Labor. The Governor shall notify the university of the adjustment. The adjustment shall become effective on July 1 of the year in which it is reported;

(4) Manage and maintain, and provide for the payment of all charges on and expenses in respect of, all properties utilized by the university; and

(5) Invest certain monies in such obligations, securities and other investments as the board shall deem prudent, as follows:

In not for profit corporations utilizing income realized from the sale or licensing of intellectual property, as well as the reinvestment of earnings on intellectual property; income realized from the operation of faculty practice plans of the university; and income from overhead grant fund recovery as permitted by federal law;

Appendix E

In for profit corporations utilizing income realized from the sale or licensing of intellectual property, as well as the reinvestment of earnings on intellectual property.

(o) Borrow money and to secure the same by a mortgage on its property or any part thereof, and to enter into any credit agreement for the needs of the university, as deemed requisite by the board, in such amounts and for such time and upon such terms as may be determined by the board, provided no such borrowing shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit or be payable out of the property or funds, other than moneys appropriated for that purpose, of the State;

(p) Exercise the right of eminent domain, pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C.20:3-1 et seq.), to acquire any property or interest therein;

(q) Adopt bylaws and make and promulgate such rules, regulations and orders, not inconsistent with the provisions of this act as are necessary and proper for the administration and operation of the university and to implement the provisions of this act;

(r) Authorize any new program, educational department or school which will require, at the time establishment or thereafter, an additional expenditure of money, if the establishment thereof is approved by the Board of Higher Education and provision is made therefore by law;

(s) Functions as a public employer under the "New Jersey Employer-Employee Relations Act," P.L.1941, c. 100 (C.34:13A-1 et seq.) and conduct all labor negotiations, and with the

participation of the Chancellor's Office and Governor's Office of Employee Relations act as the chief spokesperson with respect to all matters under negotiations;

(t) Sue and be sued in its own name;

(u) Notwithstanding the provisions of section 7 of P.L.1970, c.102 (C.18A:64G-7), retain independent counsel to represent a joint venture, subsidiary corporation, partnership or such other jural entity entered into or owned wholly or in part by the university when the enterprise involves development, manufacture, or marketing of products, technology, or scientific information, and retain independent counsel to represent any separate corporation created by the university pursuant to paragraph (1) of subsection (v) of section 6 P.L.1970, c.102 (C.18A:64G-6); however, the Attorney General shall represent the university as a venturer, partner, or in the case of a corporation, in its shareholder capacity during the incorporation phase and thereafter;

(v)(1) Participate as a general partner or as a limited partner, either directly or through a subsidiary corporation created by the university, in limited partnerships, general partnerships, or joint ventures engaged in the development, manufacture, or marketing of products, technology, scientific information or health care services and create or form for profit or not for profit corporations to engage in such activities; provided that any such participation shall be consistent with the mission of the university and the board shall have determined that such participation is prudent. Nothing herein shall be construed to authorize any change in the legal status of University Hospital;

(2) The decision to participate in any activity described in

Appendix E

paragraph 1 of subsection (v) of section 6 of P.L.1970, c. 102 (C.18A:64G-6), including the creation or formulation of for profit or not for profit corporations, shall be articulated in the minutes of the Board of Trustees meeting in which the action was approved. A true copy of the minutes shall be delivered to the Governor. If, within the 30 day period, the Governor returns the minutes of the meeting with a veto of the action taken by the board, the action taken by the board shall be null and void and of no effect;

(3) The provisions of P.L.1971, c.182 (C.52:13D-12 et seq.) shall continue to apply to the university, its employees and officers;

(4) Nothing herein shall be deemed or construed to create or constitute a debt, liability or a loan or pledge of the credit or be payable out of property or funds of the State;

(5) Funds directly appropriated to the university from the State or derived from the university's academic programs or derived from payment for coverage provided by the self insurance fund for claims accruing prior to the effective date of this act shall not be utilized in the development, manufacture or marketing of products, technology or scientific information;

(6) Employees of any joint venture, subsidiary corporation, partnership or other jural entity entered into or owned wholly or in part by the university shall not be deemed public employees;

(7) A joint venture, subsidiary corporation, partnership or other jural entity entered into or owned wholly or in part by the university shall be deemed an instrumentality of the State of New Jersey;

Appendix E

(8) Income realized by the university as a result of participation in the development, manufacture or marketing of products, technology, or scientific information may be invested or reinvested pursuant to paragraph (5) of subsection (n) of section 6 of P.L.1970, c.102 (C.18A:64G-6) or retained by the board for use in furtherance of any of the purposes of this act;

(9) The board shall annually report to the Chancellor of Higher Education and the State Treasurer on the operation of all joint ventures, subsidiary corporations, partnerships or such other jural entities entered into or owned wholly or in part by the university;

(w)(1) Procure and enter into contracts for any type of insurance and indemnify against loss or damage to property from any case including loss of use and occupancy, against death or injury of any person, against employees, liability, against any act of any member, officer, employee or servant of the university, whether part-time, full-time, compensated or non-compensated in the performance of the duties of his office or employment or any other insurable risk. In addition, the university shall carry its own liability insurance or maintain an actuarially sound program of self insurance. Any joint venture, subsidiary corporation, or partnership or such other jural entity entered into or owned wholly or in part by the university shall carry insurance or maintain reserves in such amounts as are determined by an actuary to be sufficient to meet its actual or accrued claims;

(2) Monies in the fund known as the Self-Insurance Trust Fund administered by the State Treasurer shall continue to be available to the university solely to indemnify and defend claims against the university and its employees, officers and servants but only to the extent that such entity or individuals would have been

entitled to defense and indemnification pursuant to the "New Jersey Tort Claims Act: (N.J.S. 59:1-1 et seq.) as a State entity or State employee but for the provision of subsection (t) of section 6 of P.L.1970, c.102 (C.18A:64G-6). Any expenditure of such funds shall be made only in accordance with the provisions of the "New Jersey Tort Claims Act" (N.J.S. 59:1-1 et seq.) including but not limited to the provisions of chapters 10, 10A and 11 of Title 59 of the New Jersey Statutes. Nothing herein shall be construed to authorize the use of the Self-Insurance Trust Fund to indemnify or insure in any way, directly or indirectly the activities of any joint venture, partnership or corporation entered into or created by the university pursuant to paragraphs (1) and (2) of subsection (v) of section 6 of P.L.1970, c. 102 (C.18A:64G-6) and C.18A:64G-6); and

(x) Create auxiliary organizations subject to the provisions of P.L.1982, c. 16(C.18A:64-26 et seq.).

Amended by L.1992, c.84, 5, eff. Dec. 10, 1992

Supreme Court, U.S.
FILED
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No. 94-672

In the

Supreme Court of the United States

October Term, 1994

Yvonne Brown,

Petitioner,

v.

University of Medicine and Dentistry of New Jersey,

Respondent.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit properly interpreted existing case law under 42 U.S.C. §2000e and the New Jersey Contractual Liability Act and related case law in affirming summary judgment by the United States District Court for the District of New Jersey dismissing the complaint.

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COUNTERSTATEMENT OF THE CASE

This case involves petitioner Yvonne Brown's claim that she was denied a faculty appointment at respondent University of Medicine and Dentistry of New Jersey - New Jersey Dental School. Petitioner filed a complaint in the United States District Court for the District of New Jersey on February 28, 1991, alleging race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., against defendant University of Medicine and Dentistry of New Jersey ("UMDNJ"), a corporate and political subdivision then under the New Jersey Department of Higher Education, under N.J.S.A. 18A:64G-1 et seq. App. at 19.[1]

At all times relevant to her complaint, petitioner, a black female, was employed at the UMDNJ-New Jersey Dental School as a dental hygienist. Brown's duties consisted primarily of rendering dental hygiene care and services to patients at the dental school. As with other dental school employees, she also assisted the faculty in their administration of the educational program to dental students. Although Brown has characterized herself as an instructor, her limited interaction with dental students in actuality involved relatively brief and informal technical or clerical guidance to students in matters of dental hygiene and nutrition in the manner of other non-faculty clinicians and staff members. App. at 215-16, 245-49. She was not a member of the faculty, directed no courses, administered no examinations, graded no tests and issued no grades. App. at 214-16. She has neither published nor presented scholarly papers and is not formally designated on any research project as an investigator, co-investigator or research

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[1]The term "App." refers to the parties joint appendix filed with the U.S. Court of Appeals for the Third Circuit.

assistant. App. at 96-100. The "research" she refers to in her brief, at 4, is the "personal research" she described at deposition, admitting that she "didn't tell anyone about it." App. at 97-98. In contrast to faculty members at the dental school who devote the bulk of their time to teaching and/or research, petitioner spent the vast majority of her time arranging for patient care or treating patients. App. at 215. At the direction of her supervisor, Brown also did outreach work with local schoolchildren. App. at 217.

At various times during her employment in the Department of Pediatric Dentistry, petitioner allegedly requested that she be made a faculty member at the dental school and on each occasion was refused.[2] The most recent request, to the chairman of her department, Dr. Milton Houpt, was denied on or about September 7, 1987. App. at 265. That denial gave rise to this action. Houpt explained to her at the time that her duties did not merit a faculty appointment. App. at 201. Brown thereafter filed an E.E.O.C. charge, on May 24, 1988, alleging race discrimination in that UMDNJ instead appointed an allegedly less qualified non-black dental hygienist to the faculty position sought by her. App. at 264.

The hygienist referred to by petitioner, Cynthia Fong, a Hispanic/Asian, App. at 67, was actually appointed six months earlier, on or about March 12, 1987, to a faculty position in another department, Oral Diagnosis and Radiology, and by another supervisor, department chairman

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[2]As accurately described by petitioner, App. at 77, and provided in the University By-laws, faculty appointments are proposed by the department chairman to the dean. The proposed appointment is then submitted by the dean for approval by the University's board of trustees.

Peter Kudyba.[3] Fong's appointment in Oral Diagnosis and Radiology was not the result of any job posting or competition, but by Fong's request to the chairman of that department. App. at 67. Brown never requested from the chairman of Fong's department a faculty appointment and never conveyed her interest in an appointment to Fong's chairman. She thus never competed for the position awarded to Ms. Fong in that department. App. at 77-78.

Fong, who graduated valedictorian with a master's degree in dental hygiene from Columbia University School of Dental and Oral Surgery, had been the principal investigator on a number of research projects at Columbia which resulted in published papers, a co-investigator on one project and an assistant in another study at UMDNJ, and had significant teaching and administrative responsibilities, all prior to receiving her faculty appointment in the Department of Oral Diagnosis and Radiology. App. at 67. Fong's professional leadership and academic accomplishments led eventually to her appointment by the governor to the New Jersey State Board of Dentistry. App. at 357.[4]

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[3]Under the By-laws, to be appointed to the position, for example, of clinical assistant professor, the appointment received by hygienist Cynthia Fong, a candidate must demonstrate continued growth and development in his field of specialization and/or clinical service, effective teaching, ability to work independently in research, and should be recommended by his colleagues and department chairman as possessing the capacity or potential for broad, general service in the University. App. at 37.

[4]By contrast, although not considered since she never applied for the position awarded to Fong, Brown's own work history reflects both scholastic and employment shortcomings. She encountered academic difficulties in obtaining her undergraduate degree at Fairleigh Dickinson University and, at one point, had been asked to leave for poor academic performance. App. at 104-07. Additionally, she was fired from her previous job at Beth Israel Hospital and Medical Center in Newark. App. at 107.

Fong's department chairman concluded that Fong's duties at the time merited a faculty appointment in the Department of Oral Diagnosis and Radiology. Then, as now, she had no responsibility for treating patients, unlike Brown who was hired primarily to service patients in the Department of Pediatric Dentistry. Brown's supervisor Houpt played no role in Fong's appointment. App. at 211. Moreover, as Brown herself admitted during oral argument below, there was in fact no faculty position available to her or anyone else in her department (Pediatrics) at the time. App. at 360. And, indeed, Houpt had never recommended the appointment of a non-doctor to his department faculty up until four years later. App. at 204.

Brown's position was eventually eliminated in June 1991, the result of a school-wide reorganization and she was notified that she was to be laid off. App. at 230-31. Pursuant to UMDNJ policy, however, Brown exercised her "bumping rights" and when a position became available returned to the dental school on November 17, 1991. App. at 134. Her duties once again were to perform hygiene services in a number of departments, including Pediatric Dentistry, under the reorganization, App. at 194 and 232, by now almost a year after the complaint in this matter had been filed.

Contrary, therefore, to Brown's bizarre and insupportable suggestion in her brief, at 26, that UMDNJ used her medical leave as an excuse to eliminate her position and to prevent her from obtaining a faculty appointment, Brown was, in fact, employed by and present at the school on or about November 25, 1991, when Houpt posted a notice in the dental school, of an available faculty position in Pediatric Dentistry, now more than four years after

Brown's last request. This faculty position was for a clinical instructor who would instruct doctoral students in preventive dentistry. The new position was also open to dental hygienists. App. at 383-384. Not only was the position posted in the school for all, including Brown, to see, but, for the benefit of the state-wide dental community, Houpt also published an advertisement for the position in the Autumn 1991 issue of the Journal of the New Jersey Dental Association. App. at 223-24 and 384.

Despite these notices, Brown did not respond or submit an application for this position and so was never considered. Ms. Schoen, a dental hygienist and then a faculty member at the University of Maryland, did apply and ultimately was selected for the position in or around January 1992. App. at 212, 223-24. Schoen's faculty appointment in Pediatric Dentistry, like that awarded almost five years earlier to Fong in Oral Diagnosis, involved formal instruction and not clinical care. Contrary to Brown's assertion, without support, in her brief, at 10, neither Schoen nor Fong assumed Brown's old position, since, again, faculty appointments are awarded for teaching and research purposes, and not for clinical service.

Although Brown claims she was denied an opportunity to apply for the new position awarded to Schoen, the record proves otherwise. Brown was invited by the posting and published advertisement to apply. Indeed, she was even employed at UMDNJ at the time and could easily have applied for the advertised newly created vacancy, App. at 235, but she failed to do so. Brown was ultimately laid off in 1992 as a result of a University-wide reduction in force (RIF).

For all times relevant to the complaint, Brown was represented by Teamsters Local 97 of New Jersey. The terms and conditions of employment, including the remediation process for all grievances relating thereto, are governed exclusively by Article IV, Section B.1 of her union agreement. App. at 239. Brown states she requested that her union file a grievance regarding the denial in 1987 of her demand for a faculty appointment, but was advised by the union representative that the union could not handle this type of grievance, to wit, her demand to be appointed to the faculty. App. at 103. In fact, "promotion" or "upgrade" from staff to faculty is not provided for or contemplated by any framework or mechanism in the union contract or any UMDNJ rule, regulation or policy incorporated therein by reference. Moreover, there is no written or oral agreement or any understanding that Brown would be eligible for or entitled to a faculty appointment, nor has any been identified by Brown. Indeed, she has admitted that her requests were consistently denied. In short, her expectation that she would receive a faculty appointment is not based on any agreement, action or representation by UMDNJ, express or implied, regardless of the quality of her job performance.

Finally, although in the record below Brown alludes to alleged violations of other employment benefits, including UMDNJ's attendance or vacation policy, supervision practices, job posting and bidding, and reimbursement for continuing education, App. at 138-143 and 173-176, as relating somehow to her discrimination claim, there is no record of any formal grievances filed by the union on her behalf with respect to such allegations. Brown has also attributed to UMDNJ employees, other than her supervisor, certain personal comments, alleged to have been made by an unidentified person back in 1978 or 1979, describing her as a "troublemaker." App. at 148. None of

such comments was attributed to her supervisor, and none has ever been substantiated.

The EEOC investigated Brown's complaint and, on June 23, 1989, dismissed the charge, concluding that "there is no evidence of record to indicate that Charging Party has been or is being treated differently because of her race." App. at 267. Following the EEOC's review of its decision, at Brown's request, a 90-day Right-to-Sue letter was issued by the EEOC on December 24, 1990. App. at 12. The complaint was filed on February 28, 1991. App. at 7-19.

After full discovery, UMDNJ moved for dismissal under Fed. R. Civ. P. 12(b) and for summary judgment under Fed. R. Civ. P. 56(b). App. at 28. Briefs were filed, App. at 30, 280, 322 and 330, and oral argument, App. at 347, was held in the United States District Court by a United States magistrate judge hearing the case by consent of the parties, pursuant to 28 U.S.C. §636(c). App. at 26.

On October 18, 1993 the court issued its opinion and order granting summary judgment in favor of UMDNJ and dismissing the complaint. Petitioner's Appendix B. The court concluded from the evidence and arguments that, inter alia, Brown had failed to state a prima facie case for discrimination. The court concluded that the persons with whom Brown compared herself were given faculty positions different than the one requested by Brown and that "plaintiff never applied for the positions that Ms. Fong and Ms. Schoen received." Petitioner's Appendix B, at 15a. Additionally, the court determined that plaintiff's claims of breach of an implied covenant of good faith and fair dealing were precluded by the provisions of the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq.

Petitioner's Appendix B, at 12a. Finally, Magistrate Pisano concluded that "no genuine issue of material fact exist[ed] for trial." Petitioner's Appendix B, at 7a.

On July 6, 1994, the United States Court of Appeals for the Third Circuit issued a Judgment Order which summarily affirmed, without opinion, the decision of the district court. Petitioner's Appendix A, at 1a-2a.

ARGUMENT

I. THE THIRD CIRCUIT COURT OF APPEALS' AFFIRMANCE OF SUMMARY JUDGMENT WAS IN KEEPING WITH ITS OWN AS WELL AS THIS COURT'S INTERPRETATION OF TITLE VII

A. Petitioner Was Unable to Meet Her Prima Facie Burden

Petitioner claims that UMDNJ discriminated against her by denying her a faculty position in favor of two less qualified non-black hygienists, one of whom petitioner originally erroneously claimed as being white. As found by the courts below, petitioner failed, however, to make a prima facie case for disparate treatment under Title VII because of the undisputed facts that she never applied for either of the positions eventually awarded to the other hygienists. Petitioner's Appendix at 15a.

In a Title VII claim, a plaintiff is required first to establish a prima facie case by showing that she was a

member of a protected class, that she applied for an available position for which the employer was seeking applicants, that she was qualified for the position in question, but was nonetheless rejected, and that equally situated non-members of the protected class were treated more favorably with respect to such position, or that the position remained vacant and the employer continued to seek applications from individuals equally or less qualified than the complainant. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Ezold v. Wolf, Block, Schorr & Solis Cohen, 983 F.2d 509, 522 (3rd Cir. 1992).

Reading petitioner's brief, in particular, her latest recollection of facts in her succession of appeals, it is often difficult to believe that this is the same plaintiff who is the subject of the record below. Her brief is filled with distortions and unreferenced facts and crippling inconsistencies. The district court, however, recognized simply that Brown had failed to demonstrate any factual dispute as to the prima facie elements of her claim and, indeed, failed even to establish that such elements even existed in her case as a matter of law. Petitioner's Appendix at 7a, 14a-15a.

Brown was required to show that she was equally or more qualified for an available position than other similarly situated employees selected. Although, as a matter of record, Brown was not as qualified as those selected, in fact, there was no available position in her department in 1987, as she herself admitted during argument, and no applications were sought or solicited. App. at 360. Moreover, Brown never actually sought either Fong's or Schoen's position. It is also undisputed that Brown and Fong were assigned to different departments

with different responsibilities and reported to different supervisors. Fong's request to her supervisor occurred almost a year before Brown's request to her own supervisor. Brown's supervisor Houpt had no involvement in Fong's appointment in another department and neither Fong nor Brown sought or received an appointment from the other's supervisor. The record also demonstrates that Fong and Brown each served her respective department in manifestly different ways, Fong primarily as an instructor and administrator in Oral Diagnosis, and Brown as a staff clinician in Pediatrics. Brown fancies herself clinically superior to Fong and Schoen as the basis for her "qualifications," but in fact both faculty positions involved teaching experience, not clinical skills.

"It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly situated in all respects." Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992) (emphasis in original). "[T]o be deemed 'similarly situated,' the individual with whom plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct with such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Id.; see also E.E.O.C. v. Metal Service Co., 892 F.2d 341, 347 (3rd Cir. 1990) ("A disparate treatment violation is made out when an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion under title VII."). Failure of proof as to even one element of a prima facie case leaves a complaint fatally defective and susceptible to summary judgment. Garrett v. Lujan, 799 F.

Supp. 198, 201 (D.D.C. 1992), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Brown's belief that faculty positions are created and funded on an ad hoc basis to suit the whims and aspirations of anyone who applies is not supported by the record below. The same is true for her claim that UMDNJ had a "pattern and practice" of "upgrading." App. at 371. Brown conceded that Fong obtained her appointment in a different department from a different supervisor. App. at 361. Moreover, the court observed at argument that "[i]n fact, there wasn't a position given to anybody after Ms. Brown's request was denied." App. at 361. Petitioner at first tried to dispute this by claiming that another person, Lynne Connolly, a white female, was given the position, but in her deposition, Brown herself conceded that Connolly's appointment was as clinic administrator, a non-faculty position, and that Connolly's appointment occurred in 1979, more than eight years prior to Brown's 1987 request. App. at 129. It is also undisputed that Brown's supervisor Houpt had never recommended a non-doctor for a faculty position and did not do so until more than four years later. App. at 204.

Brown's reliance on E.E.O.C. v. Metal Service Co., supra, is misplaced and overwrought. Unlike the plaintiffs in Metal Service, Brown never conveyed her interest in a faculty appointment to Fong's chairman Peter Kudyba. Moreover, again, in contrast to the plaintiffs in Metal Service, it wasn't until after more than four years had passed and the instant complaint had already been filed, that funding for a new faculty position, open for the first time to hygienists, became available in Brown's department. Yet Brown ignored the job posting in the school and the advertisements in the statewide dental journal and utterly

failed to apply for or make known her interest in the position, giving the lie to her insistence that she "did everything conceivable and reasonable to convey her interest in job advancement." Petitioner's Brief at 15. Moreover, Brown's claim that Fong and Schoen assumed Brown's duties in the dental clinic is untrue and not supported by the record below. There is no credible evidence in the record that Brown's former position was "re-opened as a faculty position." Petitioner's Brief at 16.

With respect exclusively to the prima facie elements of her burden under Title VII, the essential facts remain undisputed. Brown never requested, never applied, and was therefore never considered for either of the faculty positions awarded to others, in the first instance involving a hygienist (Fong) not at all similarly situated to Brown, and, in the second, involving a position for which Brown, through no fault other than her own, failed to apply. Having failed to set forth the requisite factual basis for a Title VII action, Brown's discrimination claim was properly dismissed, and the court's decision properly affirmed. For these reasons alone, the petition should be denied.

These same facts also encompass UMDNJ's response to Brown's assertion in the petition that the University failed to articulate a legitimate reason for rejecting Brown's request. Although petitioner's argument relates to pretext and not her prima facie burden, the record, including her own admissions, make clear that no faculty position was available in her department at the time of her request. It is also undisputed that Brown's interest in a position was unknown to Fong's supervisor and therefore immaterial to his recommendation of Fong's appointment in 1987. And, of course, Brown did not apply more than four years later, when applications were sought by Brown's

supervisor Houpt for the position eventually awarded to Schoen. In neither case is there any evidence in the record of racial or other animus by UMDNJ or, in particular, Brown's supervisor.

Once a prima facie showing by the plaintiff is made, the defendant is obligated to articulate a legitimate, non-discriminatory reason for the action under review. McDonnell Douglas v. Green, supra, 411 U.S. at 802 (1973). The burden then returns to the plaintiff, in the context of a motion for summary judgment, to raise a factual dispute as to whether the reasons proffered by defendant are a mere pretext for discrimination. Hights v. Internat'l Harvester Co., 675 F. Supp. 418, 421 (N.D.Ill. 1987). In order to prove pretext, however, "the evidence as a whole must show more than a denial of promotion in the context of disagreement over the merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department." Molthan v. Temple U., 778 F.2d 955, 962 (3rd Cir. 1985); Bennun v. Rutgers U., 941 F.2d 154, 170 (3rd Cir. 1991), cert. denied, 502 U.S. ___ (1992).

As to Brown's apparent belief that faculty appointments are there for the asking and that UMDNJ did not provide a legitimate, non-discriminatory reason for denying Brown a faculty appointment, again, the record shows that Houpt explained to Brown back in 1987 that her staff position did not merit a faculty appointment. Whether Brown understood the explanation, was satisfied with it, or even considered it an explanation does not raise an inference of discrimination. An employer's practices need not be rational, wise or well-considered, only nondiscriminatory. Gibbs v. Consolidated Edison Co. of N.Y., Inc., 714 F. Supp. 85, 92 (S.D.N.Y. 1989)(quoting Powell v. Syracuse

U., 580 F.2d 1150, 1157 (2nd Cir. 1978), cert. denied, 439 U.S. 984 (1978)). Evidently, Brown simply chooses to color every statement, no matter how innocuous, as discriminatory.

Petitioner, cites Bennun v. Rutgers U., supra, ostensibly for the proposition that her clinical proficiency should be equated with research and teaching experience in the selection of a faculty member. Clinical skill was neither an element in the appointments of Fong and Schoen nor is it a factor in the criteria described above in UMDNJ by-laws for faculty appointments. Most important, these standards, and Brown's confusion regarding them, were irrelevant to the district court's consideration since Brown never applied for Fong's job and she never applied for Schoen's job.

B. The Court of Appeals and the District Court Correctly Applied the Standards for Granting Summary Judgment[5]

The record below contains no credible evidence that could or would support an inference that Brown was discriminated against. The clarity of the record below, unembellished by petitioner's present distortions, demonstrated to the satisfaction of the courts below that summary judgment was appropriate.

In the context of a motion for summary judgment, a court must determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Specifically, the court must inquire

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[5] This subsection addresses the issues raised in Point III of petitioner's brief.

whether the evidence "is so one-sided that one party must prevail as a matter of law." Id. at 2512; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "A plaintiff's general and conclusory allegations alone, are insufficient to establish" that such an issue exists. Miller v. Yellow Freight Systems, Inc., 748 F. Supp. 1074, 1078 (W.D. Pa. 1991), aff'd, 941 F.2d 1202 (3rd Cir. 1991); Liberty Lobby, supra, 477 U.S. at 248.

To withstand a summary judgment motion, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," but "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); see also Healy v. N.Y. Life Ins. Co., 860 F. 2d 1209, 1220 (3rd Cir. 1988), cert. denied 490 U.S. 1098 (1989). In the absence of such evidence in a summary judgment proceeding, the court may rely on its own view of the persuasiveness of the evidence and the plausibility of competing inferences. Matsushita, supra, 475 U.S. at 587-88.

Petitioner's so-called "genuine issues" in her Point III relate to the pretext component of a Title VII analysis -- Brown seems intent on ignoring her prima facie burden -- but reference to the record below exposes her factual assertions to be partly fiction, found by the district court to be based on little more than subjective and conclusory opinions or rank speculation, unsupported by any objective evidence or independent corroboration. In some instances, Brown contrives factual disputes by distorting the record on appeal, often contradicting her own prior sworn statements. See Hackman v. Valley Fair, 932 F.2d 239 (3rd Cir. 1991) (district court may disregard nonmovant's

affidavit contradicting earlier testimony in determining existence of a genuine issue of material fact); Maietta v. U.P.S., Inc., 749 F. Supp. 1344, 1359 (D.N.J. 1990), aff'd, 932 F.2d 960 (3rd Cir. 1990).

Brown's claim that Fong and Schoen have less job experience and are currently performing her old duties is not supported by the record which shows that Brown's clinical experience was not, and is not, the basis for a faculty appointment and that neither Fong nor Schoen has any direct clinical responsibilities as Brown did. Brown's exaggerated perception of her "teaching" duties is not supported by the record. The record also shows that Houpt played no role in Fong's appointment in another department. Indeed, up until 1991, he had never recommended a non-doctor for appointment to the faculty in his department. App. at 204. While Brown may not like them, these undisputed facts demonstrate the inevitability of the summary judgment granted below.

Brown also refers to a comment allegedly made by an unidentified graduate student in turn allegedly quoting another faculty member (not her supervisor Houpt) approximately more than ten years before she filed her initial complaint about her being labeled a "troublemaker." App. at 148; Petitioner's Brief at 7. This comment is inadmissible rank double hearsay, unproved and unprovable, and otherwise surely time-barred. Frieze v. Boatmen's Bank of Belton, 950 F.2d 538, 542 (8th Cir. 1991) (stray remark made four years before termination too remote to create reasonable inference of discrimination).

Brown asserts that the district court "mistakenly believed that Brown could have applied for the faculty position which was awarded to Fong." Petitioner's Brief at

27. This "belief" appears nowhere in the district court's opinion. Nor does the record below support Brown's insinuation in her deposition and her brief that Fong's appointment was obtained by stealth or that University administrators conspired somehow to ensure Brown's ignorance of any available position. In addition, as noted above, Brown's contention that she was thwarted somehow from applying for the position eventually awarded to Schoen because she was "prevented from exercising her bumping rights" is an outright distortion of the record. Brown's bumping rights were in fact honored, she was re-employed and was present when the position was advertised. Brown failed, however, to apply.

As described above, Brown was originally hired by UMDNJ despite her scholastic and employment history deficiencies. Despite mixed reviews of her performance as a dental hygienist, App. at 229, she did well enough to merit annual salary increments and whatever other benefits redound by contract to employees who perform at or above levels of expectation. None of such benefits provides for faculty appointment. Brown has been rewarded to the extent her contractual relationship with UMDNJ will allow and now intractably refuses to draw any constructive conclusions about her career except to claim that she is a victim of discrimination.

The record shows that Brown worked in a different department, for a different supervisor, and performed different functions than Fong; that Brown never apprised Fong's supervisor of her interest in a faculty position; that, with respect to the position awarded to Schoen, Brown failed even to apply. Those are not only the University's facts, they are Brown's facts. No promises of faculty appointment were made and no contractual

provisions, express or implied, exist for promoting or even contemplating promotion of a staff member into a faculty position, as Brown's own union recognized. Those too are not only UMDNJ's facts, they are Brown's facts. In considering the unembellished record before them, it is evident that summary judgment and summary affirmance were well within the established guidelines of the Third Circuit and this Court. The petition, therefore, should be denied.

II. THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S FINDING THAT PETITIONER'S CONTRACT CLAIM AGAINST RESPONDENT IS BARRED UNDER THE NEW JERSEY CONTRACTUAL LIABILITY ACT BARRING CLAIMS IN IMPLIED CONTRACT AGAINST PUBLIC ENTITIES AND THUS NO NEED FOR THIS COURT'S REVIEW OF STATE LAW IS WARRANTED

Contract actions against UMDNJ, a corporate and political subdivision of the State of New Jersey, are expressly governed by the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq., as provided in N.J.S.A. 18A:64G-3.1. The Act provides, in part, that "there shall be no recovery against the State ... for claims based upon implied warranties or upon contracts implied in law." N.J.S.A. 59:13-3. Accordingly, Brown's claim for breach of an implied covenant of good faith and fair dealing, more specifically, her contention that there is some kind of implied obligation on the part of UMDNJ to appoint her to the faculty, is barred by the Act.

The Contractual Liability Act is applicable to the State and any agency or office of the State, but does not

ordinarily apply to any state entity "which is statutorily authorized to sue and be sued." N.J.S.A. 59:13-2. Prior to amendment of UMDNJ's enabling legislation in 1992, described below, UMDNJ's sue-and-be-sued status was admittedly less explicit as the statute in effect at the time the cause of action allegedly arose did not specifically confer sue-and-be-sued status on UMDNJ. Petitioner argues that the former statute should be read to imply such authority. Nonetheless, as interpreted by the district court below and by the New Jersey state courts, UMDNJ is a public agency that, at the time the cause of action arose, did not have the statutory authority to sue and be sued and is therefore covered under the Contractual Liability Act. See also Briscoe v. Rutgers U., 130 N.J. Super. 493, 327 A.2d 687 (Law Div. 1974) ("the new corporate [UMDNJ] had no power to sue and be sued." Id. at 507, 327 A.2d at 695); and Rich v. State, 171 N.J. Super. 91, 407 A.2d 1281 (Law Div. 1979) ("the act which created [UMDNJ] designated the college as a state agency in the Department of Higher Education ... but without the power to sue and be sued." Id. at 93, 407 A.2d at 1282).[6]

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[6]The state Supreme Court of New Jersey in Fuchilla v. Layman, 109 N.J. 319, 537 A.2d 652 (1988), suggested otherwise, but petitioner has plainly misread the court's opinion. In fact, the court, while determining that UMDNJ was a "person" subject to 42 U.S.C.A. §1983, nonetheless declined to decide whether UMDNJ has "sue and be sued" status in the absence of an analysis of the legislative history, terming its status "problematic" and "inconclusive." Id. at 329, 537 A.2d at 658. Rich v. State and Briscoe v. Rutgers thus remain good law.

The court in Cohen v. UMDNJ, 240 N.J. Super. 188, 572 A.2d 1191 (Ch. Div. 1989), rev'd and remanded on other grounds, ___ N.J. ___, ___ A.2d ___ (1993), in dicta, cited to N.J.S.A. 18A:64G-6,7 of the former statute for the proposition that the University had the power to sue and be sued. Id. at 194, 572 A.2d at 1194. The district court below, however, agreed with respondent that a close reading of the provisions cited in Cohen reveals that neither N.J.S.A. 18A:64G-6 nor 64G-7 of that statute explicitly granted the University the power to sue and be sued.

A review of the legislative history behind enactment of the UMDNJ Flexibility Act of 1992 strongly supports this interpretation. The Flexibility Act amending UMDNJ's enabling legislation expressly restored sue-and-be-sued status, N.J.S.A. 18A:64G-6(t), while specifically maintaining governance of the Contractual Liability Act over contract claims against the University. N.J.S.A. 18A:64G-3.10.

The Flexibility Act was enacted, in part, in response to recommendations made by the Governor's Task Force on the Laws Governing the University of Medicine and Dentistry of New Jersey. This task force was created by Executive Order No. 177 in 1987 to study and consider various restraints on UMDNJ's ability to fully enter into and participate in partnerships with the private sector that would enhance its competitive status. Among these restraints, the task force noted that "UMDNJ's enabling legislation does not provide that it can 'sue and be sued'." Report of the Governor's Task Force on the Laws Governing the University of Medicine and Dentistry of New Jersey, March 30, 1989, at page 19. App. at 277-78. Consequently, the Legislature expressly conferred such authority to UMDNJ in the Flexibility Act. Statements appended to the Act when it was introduced in the Legislature confirm this. In both the Assembly Education Committee Statement to Assembly, No. 1094 (March 19, 1992), Attachment 3, and in the Assembly Health and Human Services Committee Statement to Assembly, No. 1094 (1st Reprint), May 4, 1992, App. at 279, the Legislature stated that the proposed legislation now "permits the university to sue and be sued in its own name." It is well settled that when the Legislature intends to confer sue-and-be-sued status on public entities, it does so specifically. See, e.g., N.J.S.A. 27:23-5(d) (New Jersey Turnpike Authority); N.J.S.A. 27:25-5(a) (New Jersey

Transit); and the new provisions relating to the University, N.J.S.A. 18A:64G-6(t). It is clear then that UMDNJ is and has been protected by the provisions of the Contractual Liability Act, as the district court concluded, and thus Brown's contract claim thereunder was properly barred.

Alternatively, petitioner's breach of covenant claims are in any event barred under the exclusivity provisions of her union's collective bargaining agreement. Article IV, Section B.1 (Grievance Procedure) of the union contract provides as follows:

> The purpose of this procedure is to assure prompt and equitable solutions of problems arising from the administration of this Agreement or other conditions of employment by providing an exclusive vehicle for the settlement of employee grievances. [App. at 243.]

A plaintiff may thus seek redress of any grievance derived from breach of contract, including any policies governing the terms or conditions of employment, through the Grievance Procedures established in the union agreement. See N.J.S.A. 34:13A-5.3 (The New Jersey Employer-Employee Relations Act) ("Grievance ... procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.") (emphasis supplied); Sanginario v. Attorney General, 87 N.J. 480, 491, 435 A.2d 1134 (1981).

Brown's "contract" claims of course are emphatically denied. But, in any event, there appears no evidence in the record of any formal grievances concerning

any of Brown's putative claims regarding the terms and conditions of her employment, including the school's attendance or vacation policy, job posting and bidding, supervision, and reimbursement for continuing education. And, as noted above, Brown's union declined to pursue a grievance on her behalf relating to the denial of her request for a faculty appointment.

Thus, even if the Contractual Liability Act is held inapplicable, Brown's breach of covenant claims are barred by the exclusivity provisions of her union agreement.

CONCLUSION

For the reasons stated in Magistrate Judge Pisano's opinion and for the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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